NO. 870.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY and A. G. KERNS, Administrator of the Estate of JAMES CLARK, Deceased,

Appellants,

vs.

THE BUFFALO HUMP MINING COMPANY (a Corporation), and THE EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a Corporation),

Appellees.

APPELLANTS' BRIEF.

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STATEMENT.

This suit is brought to cancel a conveyance made by the complainants to the defendant, the Buffalo Hump Company, and by that Company to the defendant, the Empire State Company, of a four-fifths interest in the Ella and Missing Link mineral claims at Burke, Idaho, which lie between the Poorman mine and the O'Neill mine, and extending about 200 feet in length, upon the ground that a fraud was perpetrated upon the complainants at the time of their conveyance, same consisting of false representations as well as the concealment of material facts concerning the condition of, value, and ore discoveries within the property. Both claims are patented. The Poorman mine is owned by the defendant, the Empire State Company, and was owned by the defendant, the Buffalo Hump Company, at the time, and long prior to the conveyance by the complainants to it of the Ella and Missing Link; and at all those times the Buffalo Hump Company owned an undivided one-third interest in the O'Neill mine, lying east of the Ella and Missing Link, which interest is now owned by the Empire State Company. *Neither the Buffalo Hump Company nor the Empire State Company owned any interest in or had any right to enter the premises in controversy in this suit, either for the purpose of prospecting the same or of passing to and from the O'Neill ground (in which they owned an interest) prior to the 20th day of October, 1899.* The Poorman mine

crosses Canyon creek at practically right angles, and extends up a steep, precipitous mountain therefrom. The Ella and Missing Link, being on its end, are correspondingly higher up the mountain. The bill alleges:

"That the country there and thereabouts is broken and the "mountains precipitous and high. * * * Both of said min- "ing claims being at a point on said mountain more than 1200 "feet above the level of said Canyon creek. * * * That "during the summer and fall of 1899 the defendant, the Buf- "falo Hump Mining Company, was mining extensively upon "said Tiger and Poorman mines, and had a combination shaft "sunk thereon * * * which shaft started at about the level "of Canyon creek and extended downward to the 1600 foot "level. * * * And the defendant, the Buffalo Hump Mining "Company, was entitled to the exclusive possession of all the "workings within said Tiger and Poorman mines, and no other "person than the owner or those authorized by it were entitled "to have access to the workings therein, or to any information "concerning such workings, or the condition or value or extent "of the ore reserves therein, or any part thereof. That the "drifts and stopes throughout the said Tiger and Poorman "mines from the said combination shaft to the Ella line were "more than 2000 feet in length, and were winding and circuit- "ous in their courses."

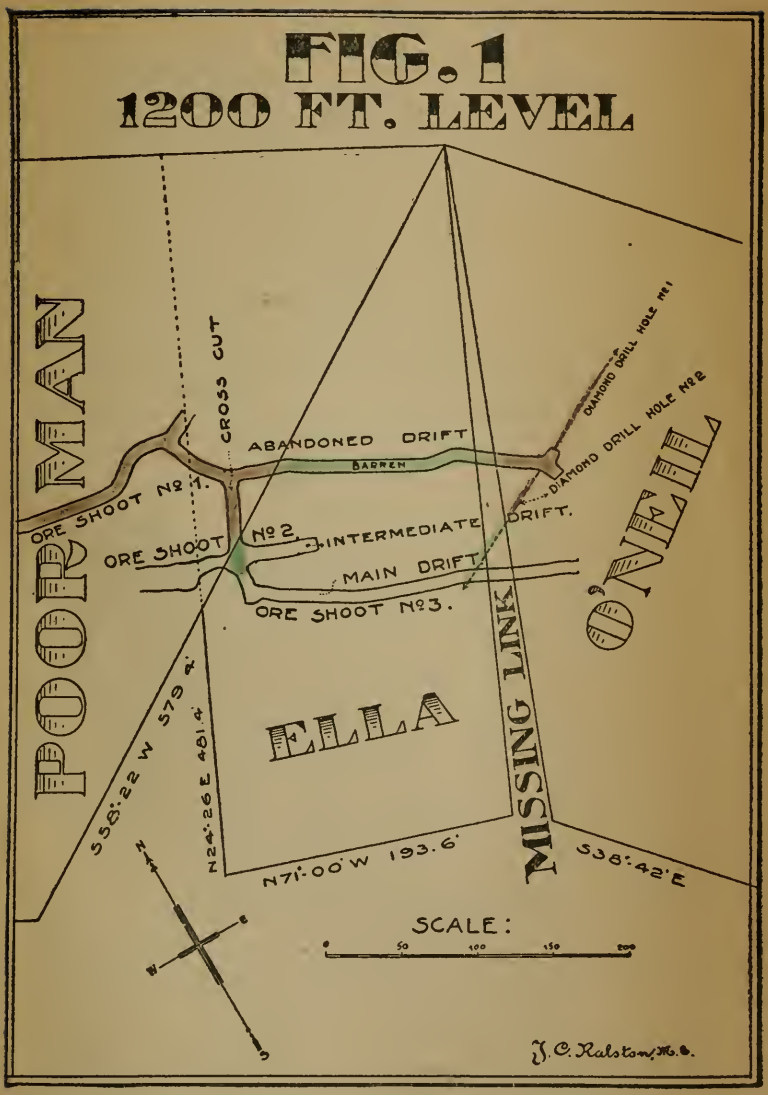
(See Par. V of bill).

These allegations of the bill are undenied, and therefore admitted. The complainants had worked the Ella and Missing Link to the 800 foot level, and they charge, and the proof on both sides is, that the ore was practically exhausted when they discontinued working there in 1894. The vein extending through the premises in controversy is what has been known as

the Tiger-Poorman vein. A large continuous ore shoot extends through the Tiger and Poorman, and runs very close to the Ella line. At that place on the main vein the ore discontinues, but the defendants, or somebody representing them, extended the drift on the 1200 foot level beyond the east end of the Poorman and through the Ella and Missing Link claims into the O'Neill claim. This ground was found to be barren from the end of the Poorman line easterly through the Ella, Missing Link and O'Neill; but the Buffalo Hump Company concluded to prospect for the ore that disappeared at the end of the Poorman as aforesaid. To that end they ran a diamond drill hole called "diamond drill hole No. 2." This hole was started within the O'Neill claim, thirty feet east of our line, but was run at such an angle as to, and in fact it did, strike the ore a very few feet within our lines. They then dropped back 210 feet to the west and started a cross-cut. This cross-cut was started within defendant's ground (the Poorman claim), thirty feet west of our west line, but that cross-cut was run at such an angle as to, and in fact it did, strike the ore a very few inches within our lines. Sixteen feet of ore was encountered in drill hole No. 2. Our witnesses say six feet of it was clean shipping ore, defendant's witnesses say six feet of *good concentrating* ore. The cross-cut struck, our witnesses say, fifteen feet of ore, four feet of clean shipping ore; defendant's witness (they had only one on this point) said it was very insignificant, six inches or thereabouts. The course of the diamond drill hole (No. 2)

and the cross-cut were so convergent that they would have intersected each other if driven about 325 feet.

The following figure illustrates the 1200 foot level where the drill hole and cross-cut were driven:



GREEN

Indicates extent of defendants' (appellees') trespasses prior to delivery of complainants' (appellants') deed.

"Abandoned drift" shows the continuation of the main drift from the Poorman through the premises in controversy, and is in barren ground. Diamond drill hole No. 1 and diamond drill hole No. 2 show the points at which, and the courses in which, the defendant, Buffalo Hump Company, ran diamond drill holes prospecting for the ore that was lost on the Poorman mine. These diamond drill holes were run early in August, No. 1 being run first, No. 2 immediately thereafter. The ore was struck in the Ella by diamond drill hole No. 2 August 13, 1899. Diamond drill hole No. 3 was run immediately after that, and the ore struck in the month of August. It penetrated only a small body of ore within the Poorman ground. The cross-cut, which is indicated on Fig. 1 as "Cross-cut," was started early in September, and was run with the evident purpose of tapping the ore that had been struck by the diamond drill holes south of the abandoned drift. The ore was struck in the cross-cut on the 8th of October. The size of the ore body which was there encountered is material.. It was demonstrated at the time of the conveyance that a very rich mine was probably contained within the premises in controversy.

It is admitted that the Buffalo Hump Company had not received authority, express or implied, from the complainants to prospect nor in any manner whatsoever to use or take possession of either the Ella or Missing Link claims. It is further conceded that the complainants were advised *after the abandoned drift had been prosecuted through the Ella and Missing Link that the same had been driven, and that no ore had been*

found therein; but they were not advised before their conveyance that any other or further prospecting, either by diamond drills, cross-cuts, or otherwise, had ever been made in or upon either the Ella or the Missing Link. It is further conceded that when the ore was struck in the cross-cut and by the diamond drill the complainants were not advised, nor were they ever advised by the defendants or either of them or by their employees of those facts.

Mr. F. R. Culbertson was the resident manager of the Buffalo Hump Company at all times mentioned in the bill. He owned a one-fifth interest in the Ella and Missing Link claims, as a tenant in common with the complainants at all such times. The bill charges (but Mr. Culbertson denies) that this interest was deeded to him by the complainants for the purpose of compensating him for his services in watching the said Ella and Missing Link claims, and in the event that the workings in the adjacent mine (Poorman) developed any ore bodies so near the Ella line as to be probable that the same extended into and through the Ella, he should advise the complainants of that fact (see Par. VI of the bill). The bill charges that after the ore had been struck by diamond drill hole No. 2, Mr. Culbertson, occupying the dual position of tenant in common with the complainants and resident manager of the Buffalo Hump Company, for the purpose of defrauding complainants out of their interest in the Ella and Missing Link claims, falsely stated to the complainant, Mr. Clark, that he had sold his interest in the Ella and Missing Link lodes to the Buffalo

Hump Company for the sum of $500, and that no ore had been discovered either in the Ella or Missing Link, or so near the Ella line as to be probable that the same extended into or through the Ella. Mr. Culbertson denies this. It is further charged in the bill that Mr. Charles Sweeny was the general manager of the Buffalo Hump Company and also of the Empire State Company, at all the times mentioned in the bill; that on the thirteenth day of October, 1899, for the purpose of cheating and defrauding the complainants out of their interest in the Ella and Missing Link, he stated to the complainant, Mr. Patrick Clark, at the city of Spokane, that the Buffalo Hump Company had purchased the interest of Mr. Culbertson aforesaid for the price of $500.00; that the Ella and Missing Link claims were no good, and had no value as mineral claims; that they were not worth fifteen dollars, and were only valuable to the Buffalo Hump Company for surface rights, and as a means of access to and from the O'Neill claim, in which the Buffffalo Hump Company owned a third interest. He and Mr. Culbertson suppressed from the complainants all ore discoveries within the Ella aforesaid, and the fact that trespasses at depth had been committed on the Ella and Missing Link claims, or that any ore had been discovered therein. The complainants, believing these representations, not knowing of the ore discoveries, nor of the prospecting, and not knowing of any trespasses committed upon their premises, by which large or any discovereis of ore were made, on the 20th day of October, 1899, executed deeds of conveyance to the Buffalo Hump Company for

a four-fifths interest in the Ella and Missing Link for the sum of $4000. At that time it had been demonstrated that the premises were worth more than $100,000, perhaps $1,000,000. Mr. Culbertson did not convey his interest until more than a month afterwards. He claims to have received only $1000 for his one-fifth, *but eleven dollars in United States revenue stamps are attached to his deed to the Buffalo Hump Company for that one-fifth, and were canceled by him.*

Different conversations between Mr. Culbertson, Mr. Sweeny and the complainant, Mr. Clark, were held at Spokane, a distance of about 140 miles from the Ella and Missing Link. The statements made by Mr. Culbertson and Mr. Sweeny as to the value, the failure to discover ore, etc., were believed by the complainant, Mr. Clark, because, among other reasons, they confirmed a belief that he had theretofore for many years entertained that the premises had no value, Mr. Clark himself having previously worked the claims for some years. It is admitted that no means of access to the Ella and Missing Link existed at the point where the ore was struck by the diamond drill and by the cross-cut, in fact, the 1200 foot level, except through the workings of the Buffalo Hump Company; that is to say, down its combination shaft, thence easterly through its drifts. The answer admits the finding of the ore by the diamond drill in drill hole No. 2 in the month of August, and it admits that $25,000 worth *net* of ore had been extracted from the premises in controversy at the time of the filing of the answer September 13, 1901. This we deem a fair statement of the issues and

admitted facts, sufficient at least to enable the Court to comprehend at the outset the complainants' contention.

The sketch used by the Circuit Judge, copy of which is attached to his opinion at pp. 149 and 150, Vol. 1, Trans., is erroneous in that the scale is 30 feet to the inch, while it should be 60 feet to the inch. The mistake is apparent from the admitted facts. The Ella and Missing Link are over 200 feet long, as shown by the opinion, by the bill of complaint, and admitted by the answer, while the sketch shows them to be only half that length. The map used by the Court was one put in evidence by the defendants, as will appear from the following written across its face, to-wit: "Defts Ex. 5 I."

The Circuit Court decided the case in favor of defendants, and dismissed complainants' bill. In doing so, the Court found that the property at the time of the sale was worth more than complainants received for it and more than they would have taken for it, had they known the exact conditions then existing in the drill holes and in the cross-cut, and that the condition of the property at the time of the sale was not communicated to complainants; "that Sweeny, the general manager of the de-"fendant companies, knew of the ore discovered in the drill "holes and cross-cut and did not communicate such knowledge "to the complainants;" "that independently of the value of "the property, said Sweeny would have purchased it because "of the situation and surface rights;" "*that complainants have "not proven the fraud they charge by that clear and decided "evidence which the law demands;*" "that complainants made

"no sufficient effort prior to the sale to ascertain the value of "the property;" and "that complainants delayed an unreasonable "time (eighteen months) in bringing the suit."

Specifications of Errors Relied Upon by Appellants.

The decree entered in this case dismissing complainants' bill is erroneous; because,

I.

1st. The evidence showed that the defendant, the Buffalo Hump Mining Company, procured the complainants to transfer to it, the property in controversy, by false and fraudulent representations made to the complainants, by the officers of the defendant company; because,

2nd. The evidence showed that the defendants secretly and clandestinely explored the premises in controversy, through the workings owned by and under the exclusive control of the defendants, without the knowledge or permission of the complainants, and that in doing so, they committed trespasses, and at the time of making the purchase of the premises in controversy, suppressed from the complainants, the ore discoveries within the premises in controversy, for the purpose of cheating and defrauding the complainants, the complainants not having equal means of knowledge thereof; because,

3rd. The evidence showed that the consideration paid to the complainants for the purchase of the premises in contro-

versy, was so grossly inadequate as to make the sale fraudulent; because,

4th. The evidence showed that if the defendants had not fraudulently concealed and suppressed from the complainants the condition of the premises in controversy at the time of the sale, a matter which was exclusively within the knowledge of the defendants, complainants would not have assented to the sale.

II.

Because said decree is contrary to the evidence.

III.

Because said decree is contrary to law.

IV.

Because the decree should have been in favor of the complainants, according to the prayer of the bill of complaint.

V.

The Court erred in holding that complainants made no sufficient effort, prior to the sale, to ascertain the value of the premises.

VI.

The Court erred in holding that complainants have not proven the fraud they charge, by that clear and decided evidence which the law demands.

VII.

The Court erred in holding that complainants in delaying for over eighteen months to commence their action have not shown

the best of faith, and that it was unreasonable that they should have been so long in making their discoveries; because,

The evidence showed that complainants filed their bill of complaint within a reasonable time, after becoming informed of the fraud perpetrated upon them, complained of in said bill, no intervening right having accrued.

VIII.

The Court erred in holding that a higher degree of caution is required, and more investigation demanded by a party selling a mineral claim than in selling any other character of property, before a charge of fraud can be established with reference to the same.

IX.

The decree should have been for the complainants, because the Court has found:

1st. That the property in question was, at the time of sale, of greater value than complainants received.

2nd. That the price received would not have been accepted had they known, at the date of the sale, the conditions then existing in the drill holes and cross-cut upon the property in controversy.

3rd. That Sweeny knew of the ore discoveries in the drill holes, and must have known something of the conditions in the cross-cut.

4th. That Sweeny did not communicate such knowledge to the complainants, or either of them.

ARGUMENT.

1. As to the False Representations.

The Circuit Judge found that the preponderance of evidence on the question whether the false representations charged in the bill had been made was against us, and it is upon that conclusion that we predicate our first important assignment of error. Upon this subject the Circuit Judge concludes as follows: "Sweeny's testimony is supported by that of his partner, Lewis "Clark. Under the usual rules of evidence, this would be conclu- "sive against that of Patrick Clark * * * " This is not a correct statement of the law from any standpoint, and the application of such a rule to this case has, we believe, been one of the principal causes for the Circuit Judge to misconceive the effect and weight of the evidence and arrive at what we believe to be an erroneous conclusion. We will now invite the Court's attention to a discussion of the evidence upon that question from which we earnestly contend that but a single conclusion can be drawn, viz.: That the false representations were made as charged in the bill and that any other conclusion is illogical.

Mr. Patrick Clark testifies (see page 479, Vol. II, Trans.)

"A. In the latter part of August, 1899, Mr. Culbertson "came to me in my office in the Ziegler block and said: 'Do you " 'know that your brother never gave me that one-twentieth " 'interest in the Ella?' I said I did not know that. Well, " 'he says that he did not; he promised it to me. I have kept my " 'end of this contract; I did not find anything, and I want you " 'to keep yours.' I said, 'I certainly will attend to it right

" 'at once. Have you found anything there?' He says, 'No,
" 'we have not.' Well, I said, 'Why do you come after it at
" 'this time?' 'Well,' he said, 'to tell you the truth, I have
" 'made up my mind to leave that country. Mr. Sweeny and
" 'his company have bought, as you know, the interest of my-
" 'self and Mr. Glidden in Canyon Creek, and I am turning in
" 'all the little odds and ends I have around there, and I have a
" 'chance to get a few hundred dollars for this interest; that
" 'is the reason. Beside that, we have had a good deal of labor
" 'trouble there, and I am getting tired of it, disgusted with
" 'it, want to get up and leave the country.' I said, 'All right.'
" * * * A. Yes. I asked him, 'How much are you going
" 'to get for it?' or 'How much can you get for it?' He said,
" 'I can get five hundred dollars for it; you can get the same for
" 'yours, if you want it.' I said, 'I don't want it; I am not par-
" 'ticular about selling it just now; I think it is worth more
" 'money.' "

And again (see p. 482, Vol. II, Tr.) as follows:

"A. Mr. Sweeny came to my office—(interrupted).

"Q. State the date.

"A. On the 13th of October, 1899, and stated that he want-
"ed to buy the interests in some claims lying around the Ella
"that his company already owned them.

"Q. You mean around?

"A. Around the Poorman. I asked him what interests he
"referred to, and he named the Sheridan, the Ella and Miss-
"ing Link. I asked him how he owned in the Ella. He said he
"had bought Mr. Culbertson's interest in the Ella and Missing
"Link.

"Q. Did he state what he paid?

"A. He told me he paid him $500. I told him he could not
"get mine for that. And we talked the thing over for a while,
"and I asked him why he wanted it, and he said he was form-

"ing a large corporation and he did not want any side partners "in and wanted to get that particular piece of ground, that "fraction, because it lay in between a claim that they then "owned—the O'Neill and the Poorman—and the only value "that it had was for its surface value, that it was not worth $15 "for the mineral that was in it. And he finally raised the price "to $4000, and I sold it to him. He then offered me $2500 "for the Sheridan, which I refused to take; I owned a half "interest in the Sheridan; and he came back four or five days "later on and raised the price of the Sheridan to $3000, and "I accepted it.

"Q. At the time of which you speak, Mr. Clark, did Mr. "Sweeny make any statement to you of having struck an ore "body in the Ella with a diamond drill or with a drift?

"A. None whatever.

"Q. Did he make any statement to you, or any disclosure of "any kind, as to whether ore had been struck in the Ella mine "near the Poorman?

"A. No.

"Q. Did you know at that time, or did your co-owners know "of there having been an ore body struck within the limits of "the Ella either by a diamond drill in the east or by a drift in "the west?

"MR. HEYBURN: We object as incompetent and imma- "terial.

"A. I knew nothing whatever about it."

These two conversations are absolutely and in toto denied by both Mr. Sweeny and Mr. Culbertson, and their statements upon the subject are as follows. Mr. Culbertson said (see page 175, Vol. I, Trans.):

"A. The understanding was that the probabilities were "that we would strike ore below the six and eight hundred;

"as they had found ore there and had mined it, there was no "reason why the ore should not go down, why we could not "expect to find it below; and in that event, why, we were to "make the best arrangements possible with the Poorman Com- "pany for the working of this ore, and divide the proceeds. As "to any agreement, or any talk being made about keeping them "posted as to what future developments might bring forth, "there was nothing of that kind mentioned."

And again (see page [illegible], Vol. I, Trans.)

"Q. Did any such conversation (referring to the conver- "sation testified to by Mr. Clark) as that occur between you "and Mr. Clark, the complainant in this case?

"A. No such conversation ever occurred, or ever took place."

Mr. Sweeny states in substance that the first time he spoke to Mr. Patrick Clark about the property was on the street, that he never was in Mr. Clark's office, and that it was between the 1st and 4th of October that he told him that (p. 839, Vol. 3, Trans.) "I intended to buy all the property through there on "both sides. He had some property up there, and if he wanted "to sell it to let me know what they wanted for it, and if we "could agree on the price, I would buy it;" that on about the 13th of October Mr. Patrick Clark came to Mr. Sweeny's office and in the presence of Mr. Lewis Clark, Mr. Sweeny's partner, stated to him (Mr. Sweeny) that they had agreed upon a price for the property and said he would take $4000 for the four-fifths interest; that nothing was said as to the value of the mine either by Mr. Sweeny or in the shape of an inquiry by Mr. Patrick Clark; that Mr. Sweeny for the defendant companies accepted Mr. Clark's proposition and thereafter paid the purchase

price pursuant to it. Mr. Lewis Clark testified to practically the same thing that Mr. Sweeny did with reference to the conversation between Mr. Patrick Clark and Mr. Sweeny.

An order was procured by the defendants at Portland, Oregon, from Judge Gilbert in the month of December, 1901, extending the time to take defendants' testimony and providing that the testimony of Mr. Charles Sweeney should be taken in the city of New York before Mr. Clarence De Witt Rodgers on the 13th day of December, 1901, and that the testimony of Mr. Culbertson should be taken at San Francisco, Cal. (see page 124, Vol. 1. Trans.) It will also appear that on the evening of the 12th of December, in the City of New York, when the defendants knew that complainant Mr. Patrick Clark and two of his counsel, Mr. Stoll and Mr. Gordon, had travelled from Spokane to New York for the express purpose of being present at the taking of Mr. Sweeny's testimony, defendants' counsel gave notice to Mr. Stoll, one of complainants' counsel, that Mr. Sweeny's testimony would not be taken in New York, but that it would be taken at Spokane at a later date, assigning no reason or excuse whatsoever (see p. 421, Vol. I, Trans.). It will also appear that 12 days' notice was given at Spokane of the taking of the deposition of Mr. Joseph MacDonald at Treadwell, Alaska, and every possible effort was made on the part of complainants to have the attendance of defendants' counsel at such hearing, offering to extend the time or change the date to suit his convenience, but without avail (see pp. 104 et seq. and 309, Vol. I, Trans.). Defendants did not appear, and after

the deposition of Mr. MacDonald was taken, a copy of it was served upon the defendants and they were requested to appear and cross-examine him at any time before the 90 days period in which they might take their testimony had expired, and that upon their signifying their intention to do so, complainants would furnish the witness Mr. MacDonald free of charge and expense to the defendants before the same notary at the same place in Alaska, but the defendants refused to accept this offer and moved the Court to strike the deposition from the files because prematurely taken (see page 108, Vol. I, Trans.). After the motion to strike the deposition had been overruled, and after defendants' time had expired in which to take their testimony, they applied to the Court for leave to cross-examine Mr. MacDonald, which leave was granted by the Court and defendants made the cross-examination at Treadwell, Alaska, on less than six days' notice to us (see page 355, Vol. I, Trans.).

An order was made at Boise, Idaho, by the Circuit Judge on the 13th day of September, 1901, (see page 1115, Vol. III, Trans.) authorizing complainants to enter the Ella and Missing Link claims with their engineer and assistants to examine and survey the same. That order was disobeyed by the defendants, and after complainants had once entered and made a partial examination, they were not allowed to return and complete it, although they gave notice at the time of their partial examination that it would require another visit and another examination to conclude it (see pp. 616-622, Vol. II, Trans.).

Under direction of Mr. Miller, the assistant manager, Mr. Cartright, the superintendent, and assistants, dug a trench through the floor of the 800 claiming to have exposed a large and valuable body of mineral therein, but immediately covered it up. and when complainants' engineer, Mr. Ralston, and the complainant, Mr. Harvey, afterwards and in the presence of Mr. Cartright visited the 800 foot level for the purpose of verifying certain measurements and examinations which defendants claimed to have made and which complainants believed to have been erroneous, he did not call attention to the find in such trench, but allowed them to go away without an examination thereof, no doubt knowing that another session would complete the taking of testimony upon both sides. (See page 825, Vol. III, Trans.).

Mr. F. Lewis Clark was put upon the witness stand as a witness for the defendants at Spokane on the 7th day of January, 1902, at which time Mr. Charles Sweeny was *absent from Spokane.* (See pp. 680-2, Vol. 11, Trans.) He was fully examined and cross-examined and withdrawn as a witness and no intimation made that he would be called again. At that session he made no mention of a conversation with Mr. Patrick Clark in the office of Mr. Sweeny, in the presence of Mr. Charles Sweeny. Afterwards, on the 31st day of January, and *after Mr. Charles Sweeny had returned to Spokane,* he was again called as a witness, at which time he testified to the conversation of Mr. Patrick Clark, in which he was in all respects corroborated by Mr. Sweeny. He also testified *that he remembered*

the identical places in the room where the three parties sat, describing it in detail (see pp. 932, 936-7, Vol. III, Trans.); said he remembered the conversation very clearly, and that it had suggested itself to him at the time of the commencement of this suit in the summer of 1900 when he was cruising off the coast of Maine, having received some Spokane newspapers containing an account of the suit. (See page 936, Vol. III, Trans.)

Mr. Culbertson was examined in San Francisco, pursuant to the order of Judge Gilbert, *supra*, because he was unable to come to Spokane. The record will show that Mr. Patrick Clark and two of his counsel, Mr. Stoll and Mr. Gordon, attended the taking of Mr. Culbertson's deposition in San Francisco, but Mr. Culbertson was afterwards produced as a witness at Spokane, where he gave testimony very much in conflict with the testimony given at San Francisco.

It is impossible to give both sides the credit of telling the truth upon the charitable theory that one is mistaken in his version, and it therefore becomes our duty to determine where the truth lies. This is not to be done by applying the rule announced by the Circuit Court that the greatest number of witnesses for or against a given proposition shall determine it, but it is to be determined by an examination and consideration of the whole case, the surroundings of the parties, their interest in the subject matter, the reasonableness or unreasonableness of their story, their reputation for truth and veracity if it has been called in quesion, the conduct of the parties to the

litigation, and finally we must not be unmindful of that elementary rule that provides that no case is to be proved by a higher degree of testimony *than from its nature it is susceptible.* Lord Mansfield thus announces the rule upon this subject:

"It is certainly a maxim that all evidence is to be weighed ac-
"cording to the proof which it was in the power of one side to
"have produced, and in the power of the other side to have con-
"tradicted."

Blatch vs. Archer, Cowp., 63 and 65; 1 Stark. Ev., p. 54.

This rule was quoted with approval by this Court in Waterhouse, Limited, et al. vs. Rock Island & Alaska M. Co., 38 C. C. A., 281.

There is abundant authority that a conspiracy to defraud may be inferred from the circumstances under which the parties are found to have acted without direct evidence of a conspiracy.

Redding vs. Wright (Minn.). 51 N. W., 1056, and cases cited.

We challenge our friends upon the other side to show wherein Mr. Patrick Clark has been squarely contradicted upon a material matter by any other witness save these three, or where his reputation for truth and honesty is impugned in the slightest degree by anything in this record, nor is there anything unreasonable or inconsistent or suspicious about his testimony concerning the conversation to which we are now directing the Court's attention. We charge, and think the record supports it, that the story of Mr. Charles Sweeny and Mr. Lewis Clark

is absurd and unreasonable and is utterly and wholly inconsistent with truth.

It is conceded that Mr. Sweeny, on behalf of the defendant companies, was desirous of purchasing the property in controversy as early as June, 1899. At that time he, knowing that Mr. Culbertson was a tenant in common with the complainants, advised him "to get some opportunity to talk with Clark with "reference to his interest" (see page 274, Vol. I, Trans.), and in August of the same year Mr. Culbertson testified that he wrote Mr. Patrick Clark, among other things (see page 778, Vol. III, Trans.). "I have advised Mr. Sweeny to go and see "you about your interest," indicating that he (Culbertson) had been unsuccessful in his interview with Mr. Patrick Clark on the 22d, 23d, 24th or 25 of August, and therefore concluded to send Mr. Sweeny himself, and corroborates the testimony of Mr. Patrick Clark as to the conversation with Mr. Culbertson, particularly as to the time of the conversation. This letter is dated August 25th, and it is only reasonable to infer that the defendants had fully as great a desire to purchase the property in October after the strike in the drill hole on the east end encountered 16 feet of ore and the strike in the crosscut on the west disclosed an equally large body, so that Mr. Clark's testimony has much to support it when he says that Mr. Sweeny and Mr. Culbertson approached him at his office.

Mr. Sweeny and Mr. Culbertson both testified that in June of 1899 an arrangement was made between them by which Mr. Culbertson was to sell his interest in the "Ella" and the

"Missing Link" to Mr. Sweeny for the defendants, for the same price that Mr. Sweeny should pay the complainants, and both testified that he (Mr. Culbertson) did thereafter, pursuant to such arrangement, sell for the same price, to-wit: $1000 for his one-fifth interest. Therefore there is much to support the contention of Mr. Patrick Clark that Mr. Sweeny stated to him that he had bought the interest of Mr. Culbertson.

The Circuit Court found that "independent of the value of "the property, said Sweeny would have purchased it because of "its situation and surface rights."

Mr. Sweeny testifies to this practically, and Mr. A. B. Campbell did also. (See p. 544, Vol. II, pp. 839-40, Vol. III, Trans.) Therefore there is much to support the contention of Mr. Patrick Clark that Mr. Sweeny told him at the conversation, *supra*, (see p. 482, Vol. II, Trans.) that he "wanted to get that partic- "ular piece of ground, that fraction, because it lay in between a "claim that they then owned, the O'Neil, and the Poorman, and "the only value that it had was for *surface value;* that it was not "worth $15 for the mineral that was in it * * *"

Mr. Sweeny testified that the property had no value to any one except his companies. (See p. 848, Vol. III, Trans.) Does this not lend color to the statements of Mr. Patrick Clark that Mr. Sweeny stated to him that the Ella and Missing Link were not worth $15 for the mineral contained in them?

The utter absurdity of the conversation which Mr. Sweeny and Mr. F. Lewis Clark put into the mouth of Mr. Patrick

Clark is apparent when we stop to consider that he is supposed to have sold this property, the value of which depended upon development at depth, *without making a single inquiry* of the intending purchaser or of Mr. Culbertson of any strikes, or development at depth, in the adjoining property, which he knew the defendants were working on both ends of his property. Mr. Culbertson testified (p. 175, Vol. I, Trans.), *supra*:

"The understanding was that the probabilities were that we "would strike ore below the 600 and 800; as they had found ore "there, and mined it, there was no reason why the ore should "not go down, why we could not expect to find it below."

Mr. Culbertson also testified at p. 244, Vol. 1, Trans.:

"Mr. Clark hardly ever had much to say. He asked me "*how the Poorman ore was coming along.*"

(This was before the purchase). At p. 180, Vol. 1, Trans., he testified:

"Mr. Clark asked me on one or two occasions as to what we "had found down there."

(This was after the sale). It will be remembered that Mr. Sweeny testified that he applied to Mr. Patrick Clark on the 4th or 5th of October to purchase the Ella, and that the deal was not closed until Mr. Patrick Clark came to his office on the 13th, when he put his own price on the property and sold it without making an inquiry. We think it very extraordinary that Mr. Patrick Clark should inquire of Mr. Culbertson "how the Poorman ore was coming along" *before a sale* was thought of, and make a similar inquiry *after a sale*

was made, but during that period, between the 4th or 5th of October and the 13th, when a buyer able and willing was in sight, negotiations were pending and he was arranging with his partners to put a price upon the property, and when the same man from whom he made the inquiries, *supra,* was accessible, he should make no inquiries of him as to the condition of the property or the development of adjoining properties, nor make any inquiry at all of the intending purchaser, whom he knew was working on the adjoining property. And that he should have selected the 13th day of October, 1899, the identical time when the defendants had *completely penetrated a large body of ore in the crosscut on his property,* disclosing about 200 feet of continuous ore from the drill hole to the crosscut, worth, as Mr. Joseph MacDonald testified he told Mr. Sweeny, a million dollars. (See p. 295, Vol. 1, Trans.) The price paid, and which the defendants claim was put upon the property by Mr. Patrick Clark himself, $4,000, was not the price of a mine, and could hardly be said to be the price of a prospect. Mr. Sweeny testified that he approached Mr. Clark to purchase his interest on the 4th or 5th of October, the purpose of this evidently being to fix it at a date before the crosscut struck the ore, but the answer which was signed by Mr. Sweeny on behalf of the defendants is in conflict with this date.

The answer of the defendants denies the conversations and the false representations, and in paragraph 7 (see p. 37, Vol. I, Trans.) uses this language: "Answering the seventh para-"graph of the complainant's bill of complaint, these defendants

"severally say that it is true that about the *13th day of October,* "*1899,* and at all times since said date, Charles Sweeny was the "General Manager of the Buffalo Hump Mining Company, and "of the Empire State-Idaho Mining & Developing Company, "*and that about said date he entered into negotiations with Pat-* "*rick Clark,* one of the complainants herein, with regard to the "purchase of the Ella and Missing Link lode claims, to the ex- "tent of the interest of the complainants therein."

And again in the same paragraph (see p. 37, Vol. I, Trans.) the following appears:

"These defendants admit that the said Charles Sweeny, acting "for and on behalf of the defendant, the Buffalo Hump Mining "Company, *did offer to and pay the said Patrick Clark* and his "co-complainants herein the sum of four thousand dollars for "their undivided four-fifths interest in and to the said Ella and "Missing Link lode claims."

And again in paragraph 8 (see p. 41, Vol. I, Trans.) appears the following:

"Or because of the complainants having no authority or op- "portunity of making a personal inspection of the underground "workings of the Buffalo Hump Mining Company, upon said "claims, or otherwise, accepted the price of four thousand dol- "lars *offered by the said Sweeny* on behalf of the defendant, the "Buffalo Hump Mining Company."

This answer was no doubt drawn and prepared after full consultation with counsel and with the greatest deliberation, and is not only signed by Mr. Charles Sweeny, but it is sworn to by him, and that, too, when answer under oath was waived by

the bill. He does not swear to it upon information and belief, but (see p. 52, Vol. I, Trans.):

"That he has read the foregoing answer and knows the "contents thereof; that the same is true of his own knowledge, "except as to the matters and things therein stated on informa- "tion and belief * * *"

This was not stated upon information and belief. Here is a sworn statement that Mr. Charles Sweeny, the General Manager of the defendant companies, on about the 13th day of October, 1899, *did offer to and pay the complainant Patrick Clark.* At that time defendants evidently felt secure in the belief that complainants could make no proof of the fraud charged in the bill. In other words, the exigencies arising in the closing hours of the trial necessitating a complete change of front with reference to this conversation as to time, place and persons present, had not arisen. No necessity or motive existed at the time of filing the answer for Mr. Sweeny to testify falsely, but it was otherwise when he was on the stand. Which oath, then, that he took is entitled to the greatest credit? Which piece of testimony possesses the greater value? That sworn to in the shape of an answer in the beginning of the trial, or that sworn to by him upon the stand, made necessary by the exigencies of a desperate case?

There was an affidavit filed in this case on the 13th of September, 1901, by Mr. Sweeny simultaneously with the answer, and a copy of it will be found at page 999, Vol. III, Trans. That affidavit was filed in opposition to an application that was made at that time for the appointment of a receiver. A com-

promise order was thereafter agreed upon by the parties and the application for the receiver withdrawn. (See p. 1115, Vol. III, Trans.) In that affidavit Mr. Sweeny purports to state very fully and in detail the facts within his knowledge pertaining to defendants' case. The bill upon which the suit was based had very specifically stated that the false representations claimed to have been made by Mr. Sweeny to the complainant, Mr. Patrick Clark, were made on the 13th day of October. (See paragraph 7 of the bill.) The affidavit of Mr. Sweeny does not deny the date, nor claim that it was at any other day, nor does it fix any day in the affidavit. No statement is there made that the conversation or that any conversation was had in the presence of Mr. F. Lewis Clark. True, these circumstances are not conclusive, yet they are, we think, powerful circumstances militating against the defendants, and when taken in connection with the other facts in the case lead one to the conclusion that the date (October 4th or 5th) and the conversation at the office of Messrs. Clark and Sweeny were each an afterthought, found necessary at the closing hours of the trial to meet the exigencies of what not only appeared to be, but what was in fact, a desperate situation.

Again, we contend that it is unreasonable that he should speak to Mr. Patrick Clark on the 4th or 5th, when he must have known that within a few days the crosscut would strike the ore. *He was enthusiastic over the strike in the drill hole* when advised of it by Mr. Culbertson in *August*. (See p. 272, Vol. I, Trans.) Ore had been struck in No. 2 and No. 3 and

No. 4 drill holes. Mr. Sweeny and Mr. Culbertson both testified that a strike in a drill hole could not be depended upon, and they were evidently going to verify those strikes by running a crosscut midway between hole No. 2 and hole No. 4, and that crosscut reached the ore on the *8th day of October.* (See testimony of Mr. Thomas Jay, defendants' foreman, at p. 427, Vol. I, Trans.) It required about five days to get through the ore, which would be the 13th, at which time the defendants were certainly ready to purchase. The size of the ore body in the drill holes and crosscut is important in determining two questions: 1st, the probability of Mr. Patrick Clark, *who did not know of the existence of either,* applying to Mr. Sweeny to purchase his ground on the *identical day when the crosscut was completed,* and *fixing his own price upon it;* and, 2nd, the probability as to whether or not Mr. Sweeny was the moving party and made any statements at all with reference thereto. The size of that ore body is shown by Mr. Thomas Jay, the foreman of defendants, Mr. Amos Jay, the shift boss, Mr. Joseph MacDonald, consulting engineer, Mr. N. H. Wright, diamond drill man, Mr. Ralston and Mr. Porter, no part of which was ever contradicted or denied by anybody, except the size of the crosscut by one witness of the name of Stone. Mr. Sweeny's estimate of it was shown by statements made some time thereafter to Mr. Albert Allen (see pp. 672-7, Vol. II, Trans.), Mr. James N. Justus (see p. 582, Vol. II, Trans.), and Mr. Jacob Rice (see pp. 585-6, Vol. II, Trans.), and that Mr. Sweeny's optimistic views expressed to these parties were fully warranted has been shown by subsequent development

of the property. (See Mr. Sweeny's annual report, complainants' Exhibit 17, p. 1165, Vol. IV, Trans.)

If the size of the ore body in the drill hole and the cross-cut was not so large or so valuable as complainants' witnesses testified, it was quite within the power of defendants to have contradicted it. They had the possession of the property at all times, their shafts and drifts being the only means of access to the underground works in the Ella and Missing Link. (See p. 34, Vol. I, Trans., Par. V., Ans.) They had a large number of miners working in it, they kept a progress map, they had the assay values of the ore—in fact, they had a complete record of the size, value and history of every foot of it, yet they made no effort to contradict either the size or the value, except *indirectly, by testimony of a most uncertain and most untrustworthy character.* It is a well recognized rule of law that where a party withholds evidence in his possession calculated to clear up a doubt or difficulty, the conclusion may be drawn and the inference is, that the evidence, if given, would militate against him. Clifton vs. U. S., 4 How., 242; Railway Co. vs. Ellis, 4 C. C. A., 454; Frank Waterhouse, Limited, et al. vs. Rock Island & Alaska Mining Co. (Ninth Circuit), 38 C. C. A., 281; Frick vs. Barber, 64 Pa. St., 120. And where witnesses refuse to explain what they can explain, the presumption is that the explanation would be to their prejudice, and in principle this would apply to a party. Heath vs. Waters, 40 Mich., 457.

There are too many strange circumstances occurring on the 13th of October, all to the advantage of the defendants and all to the disadvantage of complainants, to warrant the conclusion that defendants acted honestly with Mr. Patrick Clark and that their version of the conversation had on that day was true, to-wit: Mr. Patrick Clark, *who had never been in the office of Merrs. Clark & Sweeny before* (this is not denied), went to that office for the purpose of selling the Ella and Missing Link, *put his own price upon it, asked no questions, and did all this in the convenient presence of both Mr. Charles Sweeny and Mr. F. Lewis Clark;* that Mr. F. Lewis Clark should have remembered with such vividness and great particularity *where each of the parties in the room sat at the time of the conversation; that the ore body in the crosscut should have been completely penetrated on that very day;* that Mr. Edwin Packard, President of both companies, should have arrived at Spokane on the evening of October 12th (see p. 1075, Vol. III, Trans.); that Mr. Charles Sweeny should at that time have had the benefit of the opinion of an eminent mining expert—Mr. Joseph MacDonald—that the Ella and Missing Link *were worth a million dollars* (Mr. Sweeny bought the Tiger-Poorman mines on the oral report to him of this same Joseph MacDonald); that Mr. Sweeny should have urged upon Mr. Joseph MacDonald not to tell Mr. Patrick Clark anything about the strikes, *as he wanted to buy him (Mr. Patrick Clark) out for a song;* and that he (Mr. Joseph MacDonald) should not employ anybody in the drift at that end of the mine that

could speak the English language. (See pp. 294-5, 298, Vol. I, Trans.)

It is significant that the two participants in this conversation, Mr. Charles Sweeny and Mr. Lewis Clark, should have been found guilty of a similar fraud by this Court in the case of Kennedy Hanley vs. Charles Sweeny et al., a copy of the opinion of which is found at pp. 642-672, Vol. II, Trans, herein, and which is reported in 48 C. C. A., 612; and it is not more strange that Mr. Sweeny should have perpetrated another similar fraud upon Mr. A. B. Campbell, a co-owner in the O'Neill claim, lying east of and adjoining the Missing Link, one of the claims in controversy in this suit. (See pp. 541-5, Vol. II, Trans.) Mr. Campbell's testimony is not denied.

These matters are important, if not conclusive, as tending to prove the *quo animo*, and are always held to be admissable. In Hoxie vs. Home Ins. Co., 32 Conn., 37, the Court said: "Upon questions of *knowledge, good faith* or *intent*, any trans- "action from which any inference respecting the *quo animo* "may be drawn are admissable."

In Jordan vs. Osgood, 109 Mass., 461, this language was used: "Contemporaneous frauds committed by the defendant "are admissable if they tend to prove the motive or intention "which actuated the defendant in the transaction under inves- "tigation."

In Butler vs. Watkins, 13 Wall., 464, Mr. Justice Strong

expressed the views of the Supreme Court of the United States upon this subject thus:

"In actions for fraud, large latitude is always given to the "admission of evidence. If a motive exists prompting to a "particular line of conduct and it be shown that in pursuing "that line a defendant has deceived and defrauded one person, "it may justly be inferred that similar conduct towards another "at about the same time and in relation to a like subject was "actuated by the same spirit."

The same Court had occasion to reaffirm that principle and carry it still further in its application in the case of New York Mutual Life Ins. Co. vs. Armstrong, 117 U. S., 591.

If the defendants are guilty of the acts charged in the bill, they are capable of denying everything pertaining to them, and if we adopt the standard suggested by the Circuit Judge that the greatest number of witnesses for or against a fact should determine its truth, the scoundrel who can call to his assistance his confederates outnumbering the defrauded party must walk from the court of justice unscathed and unwhipped, but if we measure this testimony by the standard of probabilities, if we apply to it the tests that honest men apply to determining human events of every day occurrence we must be led irresistibly to the conclusion that the testimony of Mr. Patrick Clark outweighs the testimony of all that is said in contradiction of him. It may be said that Mr. MacDonald is not worthy of belief; that the Circuit Judge so found. Upon what theory the Circuit Judge was warranted in concluding that Mr. MacDonald was unworthy of belief will appear from the opinion,

and it is briefly this: That he was a *willing* witness, that he stated time and place of conversations, and that he betrayed the confidences of his employer, and that he could not have pointed out to Mr. Sweeny the course of drill hole No. 2 because there had been no surveys made. Whether his testimony warrants any of those conclusions and whether that is the test of honesty, we leave to be determined by this Court.

It is not shown that he was interested in the case, that he bears any love for Mr. Patrick Clark or any hatred for any of the defendants, that he is to receive any reward or in any manner profit by the result of this litigation. Under such circumstances, to conclude that he would lie simply for the sake of lying is a monstrous conclusion. True, several of the witnesses connected with the diamond drill gang have testified that they never saw Mr. MacDonald in the mine when the drilling was being done, but the same witnesses testify that they never saw Mr. Sweeny in the mine either. Mr. MacDonald might have been in the mine and these witnesses not have seen him, or they may have forgotten the circumstance. It was certainly not a matter concerning which a workman would especially charge his memory. There was, however, a workman named Butler, a helper on one of the drill shifts, with whom Mr. MacDonald might have had innumerable conversations. The defendants did not call this witness. (See p. 806, Vol. II, Trans.) He was their employe, and the fact that they called all the rest save this one is a circumstance which we think militates against them. Mr. Culbertson testified that

Mr. MacDonald was in the mine several times. (See p. 220, Vol. I, Trans.) Mr. MacDonald testified that the ore was struck in drill hole No. 2 at night, but Mr. N. H. Wright, in charge of the work, testified that it was at 10 A. M., that he wrote down the date. The foreman of the shift, Mr. S. G. Knight, did not remember either the day or whether night or day. (See p. 806, Vol. II, Trans.) Mr. MacDonald did not write it down, and he may be mistaken, or the strike may have been made in the morning and he not have gotten the word until night and concluded that the two were coincident. But in no event was the time of the strike material. We have endeavored to avoid contradictions on immaterial matters.

Mr. Sweeny testified that Mr. MacDonald was unworthy of belief, and yet we find that according to Mr. Sweeny's own statements, he bought the Tiger and Poorman mines and paid the sum of $250,000.00 therefor upon the *oral report made to him of those mines by this same Mr. MacDonald.* See p. 837, Vol. III, Trans., where Mr. Sweeny testified:

"A. Joe MacDonald. He said he had an option on it and "told me about it; *told me the facts about the mine, etc., and "the price that his option was*, about 35 cents, I think, if I am "not mistaken. However, I didn't do anything with it and "we thought over the matter a while and finally I sent for Mr. "Culbertson. Mr. Culbertson came into the office and I asked "him what they would take for their stock, about 600,000 "shares. He told me 25 cents a share, I think. That was the "price he and the old man had agreed upon. I told him to go "and get the 600,000 shares and bring it over and I will give "him a check for it."

He then testified in the same connection that he had no report upon the property from anybody else. (See p. 837, Vol. III, Trans.) Evidently Mr. Sweeny put great reliance, not only in the judgment of Mr. MacDonald, but in his veracity, and as to whether or not both were warranted, Mr. Sweeny's annual report (see complainants' Exhibit 17, p. 1165, Vol. IV, Trans.) will answer. Mr. Sweeny testified that Mr. Joseph MacDonald was not in the employ of the defendant companies at any time in any capacity, but in another suit pending in the Circuit Court in the District of Idaho, entitled John F. Forbis vs. Buffalo Hump Mining Co., being one of the defendants herein, it was found convenient by the Buffalo Hump Company to prove that Mr. MacDonald was their *consulting engineer* at the times he stated in his deposition in this case that he occupied that position. See pp. 948 to 968, Vol. III, inclusive of the Transcript, where it will be seen that upon a cross-examination of Mr. MacDonald, facts, tending to show that he was in the employ of the Buffalo Hump Company as consulting engineer, were elicited from him by the then counsel of the Buffalo Hump Company. Mr. MacDonald testified that a sum of money had been paid to him as *the purchase price of a bond* that he had upon the property. The Buffalo Hump Company immediately set about to show by its cross-examination, and Mr. MacDonald admitted, that the money was paid him partially for that, *but largely for his services as consulting engineer.* Mr. MacDonald's testimony, assuming that only half of it is true, convicts both Mr. Sweeny and Mr. Culbertson

of deliberately planning the fraud charged in the bill. It is conclusive on the question of intent and corroborates Mr. Patrick Clark with reference to the false representations. It corroborates and is consistent with the testimony of all our witnesses. It was therefore of the greatest importance that he should in some way be discredited.

Mr. Culbertson admits that Mr. MacDonald was not an infrequent visitor to the mines, having been through them three times between July, 1899, and January, 1900; that he was in the mine at the time Mr. Thomas Jay, as foreman, was engaged in running the crosscut; that, on another occasion, Mr. Culbertson took him through the mill and they spent the evening in the Company's office in social conversation. (See p. 221, Vol. I, Trans.) Mr. MacDonald has testified, and it is not denied, that he is the Superintendent of the Alaska Treadwell Gold Mining Company, the Alaska Mexican Gold Mining Company, the Alaska United Gold Mining Company, and the Alaska Juneau Gold Mining Company, operating mines on Douglas Island and on the mainland in Alaska, these properties constituting what is commonly known as the "Treadwell Mines" (See p. 283, Vol. I, Trans.) From this, it is not an extravagant statement, we think, to say that he is occupying one of the highest positions in the world connected with active mine management, a position of trust and high responsibility. The Treadwell Mines are probably recognized as one of the largest gold mining propositions in the world. There is nothing in the records to establish this latter proposition, but it is.

we think, a matter that is within the knowledge of every one. We think it so preposterous to assume that a man occupying such a high position would wilfully step down from that lofty pedestal to the base and ignoble position of a common criminal and commit willful perjury, prompted by neither love, hatred, ambition nor reward, that the mere statement of the proposition is a sufficient refutation of it, and when we consider that the only persons who contradict him are Mr. Sweeny and Mr. Culbertson, one of whom we have shown to have been guilty of the same sort of conduct heretofore, and both of whom we feel are so everlastingly impeached by the record which defendants have themselves made, that no further argument or comment upon the proposition is necessary.

In addition to these unreasonable circumstances and conditions surrounding this transaction, in addition to the impeachment made of Mr. F. Lewis Clark and Mr. Charles Sweeny by their having been convicted of a similar fraud heretofore by this Court, in addition to the circumstance of Mr. Sweeny having committed a fraud upon a co-owner, Mr. A. B. Campbell, for the O'Neil claim, and in addition to the testimony of Mr. Joseph MacDonald *fastening* upon Mr. Sweeny a direct and willful purpose to defraud, as further testimony to show whether Mr. Sweeny is entitled to any credit at all or not, we have him contradicted by the direct testimony of Mr. Albert Allen, who testified that Mr. Sweeny told him he had made a big strike in the east end of the Poorman mine (Poorman adjoins the Ella on the west), going into detail as to the size and

importance of the strike, showing conclusively that he was referring to the strike in the crosscut, and by Mr. Jacob N. Rice and Mr. James N. Justus, who both testified that he described the ore bodies in the crosscut and told them of the magnificent body of ore found, and stated to them that they were of great value. Mr. Sweeny denies each and all of these conversations and everything that occurred at them. He does not admit having conversations upon the subjects testified to by these three witnesses, but he denied the subject matter in toto. We find Mr. Sweeny contradicted again by his own affidavit, a copy of which is in evidence in this case (see p. 884, Vol. III, Trans.), where he states:

"That the said MacDonald, during the year 1899, sought "to enter the employment of the companies represented by this "affiant. And this affiant *did consider the propriety of mak-"ing an arrangement with the said MacDonald for entering "the employment of the said companies,* but because of certain "statements made by the said MacDonald which came to the "knowledge of this affiant, this affiant concluded that the said "MacDonald was not reliable in business transactions, and could "not be believed, either in the ordinary course of business, or "under oath, and therefore broke off all negotiations with the "said MacDonald looking towards his employment by any "companies represented by this affiant."

At page 851, Vol. III, Trans., we find Mr. Sweeny testifying as follows:

"No, sir, Joseph MacDonald has always been antagonistic "to us. He has appeared as a witness, as a professional wit-"ness, against us in nearly every case we have had, and *under*

"no circumstances would we ever employ him, in any confiden-
"tial position."

It is possible, of course, that complainants have founded this suit upon a complete fabrication of the facts. We say it is *possible,* because the vagaries of the human heart are as uncertain as the shifting of the winds, but if such were the case, there would be some suspicious circumstance rise up somewhere to tell the tale, some unreasonable or inconsistent fact that would refuse to dovetail with the remainder, instead of which we see all these irreconcilable, inconsistent and unreasonable situations surrounding the defendants. It is true that the complainant, Mr. Patrick Clark, is an interested party, but he is only interested in recovering back that which was unlawfully taken from him. Mr. Sweeny is interested not only as a party (he testified at p. 919, Vol. III, Trans., that he owned one-fifth of the stock in the defendant companies), but he is interested over and beyond that—his reputation, his honor are both involved.

Mr. Culbertson, also testified, as before stated, that he never made any representations to Mr. Patrick Clark of any kind. It is charged in the bill, and the testimony of Mr. Patrick Clark is to the effect, that Mr. Culbertson was deeded his interest in the "Ella" and "Missing Link" in consideration of his keeping complainants advised of development at depth in the adjoining properties, of which he was the General Manager at the time of the bargain. The Circuit Judge found this to be an unlawful bargain, and one that complainants could not expect to have

enforced or performed. It will be observed that the agreement with Mr. Culbertson was not to betray the secrets of his employer, but we quote from a portion of paragraph 6 of the bill of complaint, which is supported by the testimony of Mr. Patrick Clark: "And in the event that in the workings of the "'Poorman' mine any ore body should be struck, so near the "'Ella' line as to be probable that the same extended into and "through the 'Ella,' an interest in which was so conveyed to the "said Culbertson, that he should advise your orators of that "fact."

With reference to this agreement ,the Circuit Judge says: "That he was a co-tenant with complainants gave him no right "to communicate to them the business of his employers in the "properties."

What is there unlawful in this agreement? Is a mining company authorized to conduct its operations in a secret and clandestine manner in the interest only of the management and the majority of the stockholders? Are the workings, because they are underground and sheltered from the protection of inquiring eyes, any more sacred than if they were on the surface where any one could see them that wanted to? Is the size and value of an ore body being worked by a mining company at depth in which a large number of stockholders are interested a secret that is the sacred property of the management? If so, a powerful weapon is put into the hands of a few men connected with the management of a mine to defraud the public generally, and to defraud adjoining owners out of

their interests. Mr. Culbertson takes a "double-hitch" at us upon this proposition. First, he says he never made such an agreement, but admits an "understanding" (see pp. 175, 240, Vol. I, Trans.); and second, if he did make it, it was void. Let us see first whether he made it. What was he given his interest for? We invite the Court's attention to a careful examination of his testimony from page 170 to page 176, Vol. I, Trans. He testified that it was to assist in putting through the old Poorman-Tiger deal, and yet it is shown by his examination at page 173, Vol. I, Trans., that neither Mr. James Clark nor Mr. James P. Harvey, two of the complainants in this case, had any interest in effecting the consolidation referred to, nor had they any stock in the Tiger or Poorman mines, and yet he contends that the interests of these two complainants was given equally with Mr. Patrick Clark's and Mr. Benjamin C. Kingsbury's, to effect that consolidation. It is further shown by his cross-examination that by the consolidation he, Mr. Culbertson, received a large block of stock, that he received a salary of $500.00 per month (a raise of $300 above the amount received by him from the Tiger Company prior to that time (see pp. 236-7, Vol. I, Trans.) as General Manager of the consolidated companies, and that he received a large block of stock in the mercantile company that supplied the consolidated companies with stores and merchandise. The fact is, from his own evidence, it will be shown that Mr. Culbertson was the man who profited more than anybody by the consolidation, and yet he insists that the one-fifth interest in

the "Ella" and "Missing Link" was given him as a consideration for effecting that consolidation. If Mr. Culbertson's version is true, if he did not receive this one-fifth interest in the "Ella" and "Missing Link" for advice to be furnished to complainants thereafter, then he was under no obligation to reveal to his co-tenants anything concerning the development of the "Ella" and "Missing Link," unless he became an intending purchaser. He could have sold his interest for any price he saw fit, and unless his co-tenants inquired of him the facts, he was under no obligation to disclose his knowledge; but mark how scrupulously honest he becomes all at once, suggesting that he feels himself bound by some sort of a compact to his co-owners other than that created by law. At page 257, Vol. I, Trans., he testifies that he refused to accept a greater price for his interest than the complainants in this case got for theirs. We quote his exact language: "A. I was placed in a peculiar "position. I had told Mr. Sweeny that I would not sell my "interest in that property unless Mr. Clark sold his, and that "I would be perfectly willing to take whatever Mr. Clark took "for his property; and I wrote to Mr. Clark that I thought we "could sell the property to Mr. Sweeny."

And on the same page: "I supposed Mr. Clark would confer "with me."

"Q. Would you have told him of the condition had he "done so?

"A. I should probably have told Mr. Clark *what the prop-*"*erty was worth.*

"Q. Would you have told him of the drill hole that was "run in the east end of the property?

"A. If he had asked me to, I should have.

"Q. How did you expect him to ask, when nobody knew "about it except yourself and the managers of the property?

"A. Why, everybody knew the diamond drilling was going "on there."

And at page 244, Vol. I, Trans., he says:

"A. Mr. Clark hardly ever had much to say. He asked me *"how the Poorman ore was coming along.*

"Q. Did you tell him.

"A. Yes, I talked pretty freely."

Here is a *voluntary* performance by Mr. Culbertson of the very agreement that Mr. Patrick Clark testified that he made with him. This is a powerful circumstance in favor of the statements of Mr. Patrick Clark upon the question of that agreement. Mr. Culbertson at that time evidently recognized his duty under the contract, nor did he consider it unlawful or a betrayal of his employer's *secrets so long as nothing was found of value.* But when a discovery was made, *not within the property of his employer, but within the property of his co-tenants, made by his employer unlawfully,* in which unlawful matter he was a participant, then, according to the holding of the Circuit Judge, he was exonerated from the performance of his agreement because it was unlawful, and evidently the Circuit Judge exonerated him from the performance of the duty imposed upon him by law to his co-tenants.

Mr. Culbertson then testifies that he received one thousand dollars, and no more, for his interest.

When we take into consideration with all these circumstances the fact that Mr. Culbertson's deed to the Buffalo Hump Company contained upon it $11.00 in United States revenue stamps duly cancelled, placed there before record (see complainants' Exhibit 17, pp. 1162-3, Vol. IV, Trans.), we have some powerful circumstances creating considerable suspicion, to say the least, as to just what Mr. Culbertson's attitude in this matter was.

That one tenant in common dealing with another concerning the estate is required to disclose all material facts within his knowledge concerning the value, development and condition of the property, and that the suppression of any fact pertaining to any of those matters is a fraud upon his co-tenants is in law a proposition that admits of no exception, nor do we feel called upon to cite authorities in support of a proposition so thoroughly elementary. Mr. Sweeny, well knowing that Mr. Culbertson was a tenant in common with the complainants, as early as the month of June made an arrangement with Mr. Culbertson on behalf of the Buffalo Hump Company "to get "some opportunity to talk with Clark (meaning Mr. Patrick "Clark) with reference to his interest." (See p. 274, Vol. I, Trans.) With those instructions from Mr. Sweeny, it is reasonable and probable and quite consistent that Mr. Culbertson called on Mr. Patrick Clark at his office and had the conversation that Mr. Patrick Clark testified occurred between them.

Mr. Culbertson admits having had a conversation during the summer of 1899 with Mr. Patrick Clark. (See pp. 253-4, Vol. I, Trans.) He says he only had one in all that summer, but he says the date of it was June 20th. He is sure of the date. We then show by Mr. Patrick Clark, and we put in evidence some hotel registers to corroborate him in that regard (see pp. 983-6, Vol. III, Trans.), that he was not on the Pacific Coast at the time that conversation occurred, nor for several weeks before, nor for several after. Therefore, it is quite probable that the conversation occurred after his return in the month of August, as Mr. Patrick Clark testifies it did. Mr. Culbertson does not pretend that at the conversation he disclosed to Mr. Patrick Clark any of the discoveries made upon the "Ella." He testifies at pages 243-4, Vol. I, Trans., that he had, early in 1899, advised Mr. Clark of the fact that a drift had been run through the "Ella" and no ore had been found, and in this connection he testified that Mr. Clark never had much to say, but that he talked pretty freely with him. At the conversation which Mr. Culbertson admits that he had after Mr. Sweeny had authorized him to "see Mr. Clark with reference to his "interest," he admits that he did not talk freely; on the other hand, he admits that he made no disclosures of the condition of the property. In other words, he admits that he talked freely with Mr. Patrick Clark about the condition of the property before anything was found on it, but after a big strike was made and he was sent by Mr. Sweeny to purchase it, he suppressed all facts, thus leaving the impression at least that

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no change had occurred in the condition of the property affecting its value. This is equivalent to a false statement. See Stewart vs. Ranch Co., 128 U. S., 388. Mr. Culbertson's explanation on surrebuttal of this conversation, in which he abandons the cocksureness which characterized it in the first instance is guite characteristic of his entire testimony. He testified that he wrote Mr. Clark a letter on the 25th of August (the ore was struck in the drill hole disclosing 16 feet of ore on the 13th of August—see p. 208, Vol. I, Trans.). In that letter, evidently still obeying the instructions of his superior officer, Mr. Sweeny, "to get some opportunity to see Mr. Clark "with reference to his interest," and which letter Mr. Culbertson expressly testifies was *to put Mr. Patrick Clark upon his guard* (see p. 256, Vol. I, Trans.), no mention was ever made of the strike in the drill hole, nor of the fact that the Buffalo Hump Company was trespassing upon and prospecting complainants' ground. When that letter was written, Mr. Culbertson was a tenant in common with the complainants. That was known to Mr. Sweeny, the General Manager of the defendant companies, because both Mr. Sweeny and Mr. Culbertson testified that Mr. Sweeny had exacted a promise from Mr. Culbertson to sell his interest in the "Ella" and "Missing Link" to the Buffalo Hump Company for the same price that the complainants sold theirs. (See p. 190, Vol. I, Trans.) But Mr. Culbertson attempted to show, as contradicting the testimony of Mr. Patrick Clark, to the effect that he had delivered to him (Mr. Culbertson) a deed from Mr. James Clark about the 22d, 23d or 24th of August, that the deed from Mr. James

Clark and wife to him (Culbertson) was dated at a later period, and that some correspondence passed between Mr. Culbertson and Mr. Charles S. Eltinge, who at that time was Mr. Patrick Clark's private secretary, concerning that deed, and that the letter from Mr. Culbertson dated the 25th of August to Mr. Patrick Clark was also a contradiction of Mr. Clark in that regard.

It should be noted that Mr. Patrick Clark did not fix the date positively on which he gave Mr. Culbertson the deed from Mr. James Clark. He said, at page 481, Vol. II, Trans., that it was obtained "about the 24th or 25th of August." On cross-examination, at page 992, Vol. III, Trans., he said:

"A. That was later. I handed to Mr. Culbertson along about "the 22d, 23d or 24th of August, somewhere along there "* * *"

The bill (p. 9, Vol., I, Trans., Par. VIII) simply states that it occurred in August, 1899.

A careful examination of the evidence of Mr. Eltinge will show that he wrote no letter pertaining to the matter *by authority of Mr. Patrick Clark, nor as his secretary.* (The only letter which Mr. Culbertson claims to have received from Mr. Eltinge does not acknowledge receipt of any letter from Mr. Culbertson, nor purport to be in reply to any letter. See page 782, Vol. II, Trans.). That the only letter he did write was at the instance of Mr. James Clark without the knowledge of Mr. Patrick Clark (see p. 975, Vol. III, Trans.); that he never received the letters which Mr. Culbertson testifies that he wrote

to Mr. Patrick Clark; and Mr. Patrick Clark also testifies that he never received the letter of August 25th, nor any other letters upon the subject from Mr. Culbertson. What conversations or correspondence passed between Mr. James Clark and Mr. Culbertson after the conversation between Mr. Patrick Clark and Mr. Culbertson, and whether or not Mr. Culbertson sent back the deed to Mr. James Clark, which Mr. Patrick Clark gave him in August at Spokane, for correction or otherwise, or to have the name of Charlotte Clark, his wife, inserted, or for any other cause, we do not know, but when we consider the fact that Mr. James Clark's lips are sealed in death (his administrator prosecuting this suit), and that Mr. Culbertson knows that he cannot contradict him, nor give any explanation of the matter; that Mr. Eltinge, a disinterested party, should not have received any of the letters Mr. Culbertson says he wrote; and that Mr. Patrick Clark never received any of the letters, Mr. Culbertson's story is again surrounded with that same suspicion which has characterized it from the beginning.

As before shown, Mr. Patrick Clark testified that Mr. Culbertson stated to him: "Do you know that your brother "*never gave me* that one-twentieth interest in the 'Ella'" (see p. 479, Vol. II, Trans.), and that he thereupon procured the deed from his brother, James Clark, and delivered it to Mr. Culbertson on the 22d, 23d or 24th of August. The deed put in evidence from James and Charlotte Clark to F. R. Culbertson bears date of the 25th of August and was acknowledged

on the 7th of September. (See p. 1135, Vol. IV, Trans.) We call special attention to the following clause in that deed:

"This deed is executed and delivered in lieu of a former "deed between the same parties and for the same interest in said "claims, which said deed has been lost or destroyed."

Mr. Culbertson, in the conversation with Mr. Patrick Clark, did not contend that his deed had been lost or destroyed. He stated that it had never been executed. Is this not consistent with the testimony of Mr. Patrick Clark, and a powerful circumstance in favor of its truth that he did give Mr. Culbertson a deed? Is it not consistent with our theory that thereafter some transaction occurred between Mr. Culbertson and Mr. James Clark, deceased, of which no one has any knowledge except Mr. Culbertson? Is it not consistent with the theory that Mr. Culbertson lost or was dissatisfied with the deed from Mr. James Clark that was given to him by Mr. Patrick Clark in August, and that he applied straight to Mr. James Clark for another deed?

The letter of August 25th which he says he wrote to Mr. Patrick Clark for the "purpose of putting him on his guard," and incidentally asking for the deed from Mr. James Clark requires a little explanation from Mr. Culbertson. It is in evidence that Mr. Culbertson came from Burke to Spokane on the 20th of August; that he remained in Spokane until Thursday, the morning of the 24th of August. (See testimony of James Webb at pp. 969-74, Vol. III, Trans.) It is also in evidence that Mr. Sweeny arrived in Spokane from California on

the same day, August 20th, and that he left Spokane with Mr. Culbertson, Mr. Packard, President of both defendant companies, and other officers of the defendant companies on the 24th of August. (See Mr. Sweeny's cross-examination at p. 881, Vol. III, Trans.) They would, of course, arrive in Burke on the afternoon of that day. Mr. Culbertson testified in his second cross-examination taken in Spokane (see p. 790, Vol. II, Trans.) that while in Spokane he had usually little or nothing to do, but that when he was at the mine, he was required to work 15 hours a day, and that he had a stenographer to assist him, and yet we have him in Spokane on the 20th, 21st, 22d, 23d and morning of the 24th of August, and Mr. Patrick Clark also in Spokane at that time. Mr. Culbertson had this important knowledge that he wanted to impart long before coming to Spokane on the 20th, and yet he travelled from Spokane a distance of 140 miles to Burke for the purpose of writing back to Mr. Clark this important information which he says he wanted to give him for the purpose of putting him on his guard. He could have given it to him at Spokane when he had so much leisure, either by telephone or by writing him a note, instead of which he stole sufficient time at the mine, where he says he was required to work 15 hours a day, to write an autograph letter containing two and a half full pages of foolscap, which certainly required an hour's time to write, and that too on the day of the arrival at Burke, when he had the President and General Manager of both companies present with him. If he was required to work 15 hours per day ordin-

arily, on the day when the President and General Manager of the companies were there, he would still have additional duties to perform. He would doubtless be required to entertain them, to report to them, to advise them of the condition of the properties, and yet he found sufficient time after travelling from Spokane to Burke to write that long letter in his own hand. Why didn't he dictate it to his stenographer? If he wrote the letter at all, why didn't he give Mr. Patrick Clark all the facts? Why did he say to him, "I think Sweeny will buy," and stop there? If he was honest in the matter, if he was not making a record for future use, why didn't he give Mr. Clark this information before he left Spokane? Strange, indeed, that he should have written such a letter at such a time with the President and General Manager of the defendant companies at his side. Strange that it should follow so quickly upon the heels of the strike of 16 feet of ore on the east end of the "Ella," and *immediately* upon Mr. Sweeny's first visit to the mine after the strike in drill hole No. 2. Why didn't Mr. Patrick Clark recive the letter? Is it possible that he would deny the receipt of such a letter? There is certainly not enough in it that is damaging to our side of the case to warrant Mr. Patrick Clark committing perjury concerning its receipt. If we would commit perjury it seems to us that he could have done so more profitably in other directions. We call the Court's attention to Mr. Culbertson's explanation of writing that letter and keeping a copy of it when he testified at San Francisco (see pp. 246-50, Vol. I, Trans.). It is very amusing when taken in connection with

the subsequent explanation he attempted to make when he was examined the second time at Spokane.

That letter, assuming it to have been written, is conclusive of the dishonesty and fraudulent purpose of Mr. Culbertson, not because of what is said in it, but being addressed to a co-tenant and the subject of it pertaining to the estate in which they are both interested, being for the purpose of putting a co-tenant upon his guard, the suppression of material facts is in law and morals fully as reprehensible as a statement of falsehood. The ore had been struck. Mr. Culbertson knew of it, and made absolutely no mention of it..

And we respectfully ask the Courts' attention to pp. 775-8, Vol. II, Trans., containing what occurred when the letter was put in evidence and we demanded an examination of the book. We were denied an examination of the book. We then asked permission to look at the index to see if it had an index and we were denied that. Mr. Culbertson and Mr. Sweeny denied everything that is testified to by Mr. Joseph MacDonald, and herein again we see concerted action in throwing their combined force upon every place that we attach them. They deny everything carefully along the same lines.

The Circuit Judge criticised the testimony of Mr. Joseph MacDonald because he is a "willing" witness, because "he is "prudently cautious in fixing the time and place when the many "important conversations occurred at which he testifies." It does not appear that he was sufficiently "willing" to testify in

this case to come voluntarily within the jurisdiction of the Court, but on the other hand we were required to travel about 1200 miles and serve the usual notices and take his testimony in the ordinary way, to secure his testimony. It does not impress us that he did so, but suppose he did state *time and place* of conversations and *persons present,* is that a badge of dishonesty? Mr. F. Lewis Clark went considerably further in his testimony; he not only testified to *time* and *place* and *persons present*, but he remembered the *particular place in the room where each of the parties sat,* and this is, too, more than two years after the occurrence, and yet the Circuit Judge fails to apply the rule to him, apparently passing unnoticed those matters in the testimony of Mr. F. Lewis Clark.

Whether the criticism of the testimony of Mr. Patrick Clark by the Circuit Judge with reference to his being refused admission to the Tiger and Poorman mines *about eight months after the sale to the defendants,* is warranted by the record we leave to be determined by this Court. It seems to us that a careful reading of that testimony, wholly immaterial in every particular, occurring long after the events at a time when Mr. Patrick Clark was beginning to suspect that defendants were trespassing on the Poorman extension claims, shows rather a disposition on his part to understate than to overstate the facts, and no disposition at all to argue the facts with counsel for the defendants; in striking contrast with the testimony of Mr. Sweeny that is characterized throughout by insolence, brag, defiance, indifference to the rights of others and a general air of

arrogant superiority predicated upon we know not what, a good illustration of which is contained on pp., beginning the latter part of 911, 912, 913 and 914. Mr. Sweeny's testimony, Vol. III, Trans.; also Comp.'s Ex. No. 38 A, p. 1263, Vol. III, contrasting equally favorable with the voluble, argumentative and evasive character of Mr. Culbertson's testimony. And yet the Circuit Judge seems to make this immaterial piece of testimony the turning point of credibility between the parties, applying a rule to us that was not applied to the other side.

The irreconcilable conflict of defendants' evidence, the overwhelming contradiction which was made of the testimony of their principal witnesses as detailed herein, were all passed over and apparently forgiven by the Circuit Judge, while the slightest pretext is apparently seized upon to discredit the testimony on the part of complainants. We think it apparent that the Circuit Judge wholly misconceived the evidence on both sides and wholly misunderstood the entire case.

What would be the natural conduct of an honest man who was wrongfully charged with fraud? Would he run away from his accusers? Would he adopt the dilatory tactics of the charlatan and dissembler to delay the hearing, to annoy and harass his accusers and make it expensive for them to present the facts against him? Would he entrench himself behind the fact that the burden of proof was on his accusers and that he would outnumber him in his witnesses for or against a given fact, basing all and everything upon "You can't prove it?" No, an honest

man would hasten the time, make the place and seek the opportunity, that he might purge himself of the unjust and false accusation against him. But how stands this case?

The bad faith of the defendants in this case is apparent at every stage and when it is considered that the principal actors and the principal witnesses on the part of the defendants. Mr. Sweeny and Mr. Culbertson, were the General Manager and Assistant General Manager of the defendants, at the time it is charged the fraud was committed, and at all times since, these matters become important.

Mr. Chief Justice Waite announced a principle in Crosby v. Buchanan, 23 Wall, 457, aptly pertinent to this matter. An examination of the case will show that the defendant who was charged with fraud, and concealed certain matters from the Court, had acted in bad faith in the management of his cause, had offered proof of only a small part of the facts, and had suppressed and concealed others. The Court said:

"He does not excuse himself from this attempted fraud by "pleading defect of memory, but claims boldly that he was not "required to tell all he knew; that his duty was at an end when, "selecting his own facts, he presented his own case. It is true "he had a right to select that way of coming into Court, but "having deliberately made his selection he ought not to be sur- "prised if he finds that he is received with suspicion. Honesty "of purpose prompts frankness of statement. *Concealment is "indicative of fraud.*"

Here are—at least, we so charge—the two arch-conspirators, one the General Manager of both defendant companies, the

other his assistant, both reside at Spokane, both under the control of the defendant companies, and yet when it comes to take their testimony one goes to New York and we are invited to go there and take his testimony. Having gone there at a great expense, we are invited to come home. The other goes in the opposite direction to San Francisco and we are invited to go there and take his testimony at a great expense. We do so, and yet only a part of his testimony is taken and he afterwards finds it quite convenient to rendezvous at Spokane with his other conspirator upon the conclusion of the trial. They are unable to go to Alaska to take the testimony of Mr. Joseph MacDonald. We offered them an extension of time, but they rejected all overtures. After the deposition was taken, we gave them a copy and again requested them to cross-examine, which they refused. Then, after the time in which to take testimony had expired and they saw no other alternative, in the middle of winter, we are given a short notice—about five days—to go from Spokane to Treadwell, Alaska, and appear at the cross-examination of Mr. Joseph MacDonald. Having adopted every weapon in their power to prevent the taking of the testimony of Mr. MacDonald, and the cross-examination having if anything strengthened the testimony in favor of complainants, with no other weapon left at their command, they then charge him with having lied, as being a prejudiced and biased witness. Does this show that we proffered to the Court the testimony of a dishonest witness? Does it not have a greater tendency to show that the other side knew what his testimony

was going to be and that they adopted all the tricks and artifices at their command to prevent us from getting the testimony? If they did not know that there was lodged in the breast of Mr. MacDonald testimony that was damaging to them, why did they adopt all this questionable practice—and we say this with no disrespect to counsel—to prevent us from geting that testimony? These are matters that in equity arouse suspicion and are, to say the very least, badges of guilt.

The Circuit Judge held that, while Mr. Sweeny was contradicted by Messrs. Allen, Justus and Rice, these contradictions were upon immaterial matters and therefore not to be considered by him in determining the weight to be attached to, and the credibility of, Mr. Sweeny's testimony. An examination of the transcript will show that one of the vital issues of the case, one that we bent every energy to maintain, and in doing which we labored under many difficulties, was the size of the ore body on the 1200 through the Ella and Missing Link; that it was worth a large sum of money, *to the knowledge of Mr. Sweeny*, and that Mr. Sweeny had stated to Mr. Clark *that it had no value as a mineral claim*. The bill alleges that the property had great value at the time we sold, to-wit, more than $500,000.00, which was known to the defendants. The answer denies this and charges that we were paid the full value, and defendants' evidence tended in the same direction. Therefore, Mr. Sweeny's statements to Messrs. Allen, Justus and Rice as to the value and size of those ore bodies became of the greatest importance. It was not a question as to whether the statements made to

these parties were in all respects true, but it was the opinion entertained by Mr. Sweeny as to the size and value of those ore bodies.

If the Court finds that Mr. Patrick Clark's version of the facts is true; that is to say, that Mr. Sweeny stated to him as follows: (See p. 482, Vol. II, Trans.)

"A. Around the Poorman. I asked him what interests he "referred to and he named the 'Sheridan,' 'Ella' and 'Missing "'Link.' I asked him how he owned in the 'Ella.' He said "he had bought Mr. Culbertson's interest in the 'Ella' and "'Missing Link.'"

Then the Court of course must conclude that in equity *for the purposes of that transaction,* Mr. Sweeny was, or the companies that he represented were, *tenants in common* with the complainants and they were entitled to proceed upon the theory that he would, and that he did, as the law required he should, *disclose all the facts with reference to the condition and value of the property.* Mr. Sweeny at that time knew that his emissary, Mr. Culbertson, who was a tenant in common with the complainants, had interviewed Mr. Patrick Clark and had written him a letter upon the subject of the sale. Therefore, we earnestly urge that from any standpoint the deal was made between tenants in common, and the duty was imposed upon such purchasing tenant to disclose all the facts.

II. Was the Work of Prospecting Complainants' Ground Done Clandestinely and With the View of Taking Advantage of Complainants?

The Circuit Judge, in his opinion, used these expressions:

1. "While no precedents have been cited, yet were I convinced "that this work had been done clandestinely and with a view "of taking advantage of complainants, I should hold that a "purchase without a communication of all the facts to the seller "should be rescinded."

At another place in the opinion, the Circuit Judge used this language:

2. "It also appears that the 1200 foot level marked 'aban- " 'doned drift' was run in the spring of 1899 and before defend- "ants had purchased. While there is no evidence of authority "for, or objection to, what defendants have done, it seems that "since the time of Clark's management, workings have been "extended into this ground without question and acquiesced in, "and it may have been because the old company owned the "ground on both ends of the 'Ella.' Sweeny says they found "the works there and used them without knowing of any "objection. Under such circumstances it cannot be concluded "that such possession was clandestine or for the purpose of de- "frauding the 'Ella' owners."

At another place in the opinion is the following:

3. "He (referring to the witness, Mr. Joseph MacDonald,) "says he pointed out on the map to Sweeny this drill hole and "showed him that it was in the 'Ella' ground, to which it was "answered that he could not do so, because no survey had been "made connecting these underground workings with the surface "lines, which is confirmed by several witnesses, including one "of the complainants."

And again he announced this rule of law:

4. "Any conduct, whether it be of silence or of words, in-"tended to convey the wrong impression to the other party "and to deceive him, and which has such effect, comes within "the rule of fraudulent representations and is actionable," citing the pertinent and well considered case of Loehr v. Harris, decided by the Circuit Court of Appeals of the Second Circuit, and reported in the 6th C. C. A., page 394.

How the Circuit Judge harmonized that rule of law with Mr. Sweeny's testimony and still found that he was not guilty of fraud, we do not understand. For instance, at page 844, Vol. III, Trans., Mr. Sweeny testified as follows:

"Q. He (Mr. Patrick Clark) says you told him the ground "was not worth $15 for the mineral, but that you wanted it for "the reasons already stated. Did you tell him anything about "the value of this ground?

"A. There never was any question about the value "in any way. Mr. Clark never asked me any questions "about it and I never told him. *I think he thought, and I think "justly thought, that he knew more* about the property than "I did. He had worked it a good many years. *I don't think he "thought I could tell him anything about it after having the "property for two months."*

Here is a plain admission by an intending purchaser who had acquired his knowledge of the property by *trespasses* and in an *unlawful manner*, that the man he was dealing with *was laboring under the false impression* that he knew more about the property than he (Mr. Sweeny) when as a matter of fact Mr. Sweeny knew all about the condition of the property and knew that the seller knew nothing about it.

With reference to the third (3rd) quotation, *supra,* from the opinion of the Circuit Judge, we think the record does not sustain the Circuit Judge. The testimony of one of the complainants referred to was evidently the testimony of Mr. Patrick Clark, at page 500, Vol. II, Trans.

"Q. Now you ran a tunnel on the 100 foot level. You ran "that I suppose?

"A. Yes, sir.

"Q. That ran into the 'Ella' ground?

"A. I don't think it did in my time; perhaps it might, but "I don't remember it."

Again at page 496, Vol. II, Trans.:

"Q. From what level of the Poorman did you first run into the 'Ella' ground?

"A. The 600."

Again at page 498. Vol. II, Trans.:

"Q. Did not connect your stopes with any *levels above?*

"A. No, not that I know of * * *"

"Q. You think you did not connect the 6th and the 8th?

"A. I don't remember having done so."

This testimony shows that it had reference to *levels above,* and not *surface lines.* No other examination was made of any of complainants on this point. The Circuit Judge is in error in concluding that "No survey had been made connecting these "underground workings with the surface lines." It is shown to have been done by defendants' witnesses.

Mr. Miller, connected with the management of defendants, at page 715, Vol. II, Trans., testified as follows:

"A. Well, since the summer of 1899, when the Buffalo "Hump Mining Company took possession of the Tiger-Poor-"man properties, I was at that time the consulting engineer for "the Buffalo Hump Mining Company. * * *"

"Q. Mr. Miller, you have heard Mr. Smith testify that he "got certain data from you on the question of maps while he "was on the stand this A. M. Will you state what that data "was, and as to the facts in regard to your giving it to him?

"A. The principal portion of the maps which he has intro-"duced here were made from his own surveys of the live and ac-"cessible portions of the mine, both underground and on the sur-"face. Some of the old stopes which were not accessible he "took from *working maps left and in the possession of the Buf-"falo Hump Mining Company*, taken from the Tiger-Poorman mine."

At pp. 716-8, Vol. II, Trans., the same witness:

"Q. State if he made them under your direction as you have 'said, from this data.

"A. They were principally made under my direction, yes, "sir; in connection of course with the management of the mine.

"Q. State if you were consulted by him and directed him, "in the making or use of the data which you gave him,

"A. In general, yes, sir.

"Q. Now, Mr. Miller, you may state whether or not that "data represented any surveys that were made to your knowl-"edge of the 600, or other workings, above the 800 foot level.

"A. To a certain extent, yes.

"Q. State to what extent; state the facts.

"A. In the year 1894, or 1895, I have forgotten which, I did

"some work for the Poorman mine, the Coeur d'Alene Silver "Lead Mining Company, I believe it was called, underground.

"Q. In what capacity did you do the work?

"A. As engineer and surveyor. This work was placed on the "working map delivered to me and used by the company at that "time.

"Q. What company?

"A. The Coeur d'Alene Silver Lead Mining Company.

"Q. State whether or not this is the same map and the same "data that you furnished Mr. Smith and which he says he placed "upon these maps.

"A. The plan was, yes, sir. The work was carried on by "myself to the 900 and I think the 1000 foot level. I have for- "gotten the details.

"Q. Did it include the 600 and 800 foot levels?

"A. Yes, sir, I will come to that in a minute. It was a map "carried on by me, having been the original principal works of "it made by Mr. Trask and Mr. Loring, and as far as the 600 "foot level went, I surveyed it, I don't think the full length "to where it is now. My recollection is I carried it through "the O'Neill and Missing Link and—

"Q. Through the Ella and Missing Link, you mean?

"A. Through the Ella and Missing Link, and some little dis- "tance into the O'Neill, but I cannot say exactly how far. As "to the 800, I did not carry it, I should judge, but about to "the Ella; I can't recollect just where the 800 was at that time, "but I think it was very close to the Ella, and it might have been "in it, but I would not say positively. However, this old map "was found by myself or by the company *when we came into "possession at Burke*, and I found some of my work on it.

"Q. Found it where?

"A. In the vault at Burke, in the company's office. And I "found some of my old work on it, and this was the basis of "placing the 600 as far as that old map went, on Mr. Smith's "maps, which I assisted in and dictated, both on his sections "and plans. Now, I will explain something further, that I "think the 600 is shown on some of these maps farther than I "surveyed it, so of course, I cannot testify as to that. That "was done from a map found there, too, but who put it on there "of course I cannot say.

"Q. Found where?

"A. Found in the office on the map.

"Q. Of what office?

"A. In the Buffalo Hump Mining Company's office at "Burke.

"Q. Had this office, had the Poorman, or the Coeur d'Alene "Silver Lead Mining Company ever had possession or anything "to do with this office or vault?

"A. Not this particular office. The old safe that the com- "pany used to use was in there.

"Q. How, if at all, do you identify this map as being a map "of the company?

"A. Because I made a portion of it myself.

"Q. I mean the portion that you did not make, the other "map that you spoke of?

"A. Well, it was used as the working map. They did not "have very many working maps at the time there; they were "not very complete. It seems that the Consolidated Tiger- "Poorman Company were not given to surveys to any large ex- "tent.

"Q. You then have personally surveyed the 600 foot level

"as it passes through the Ella and Missing Link claims?

"A. Yes."

Now, how could Mr. Miller make these surveys unless he knew where the east end line of the Poorman was; that line is coincident with the west end line of the Ella. If this was not known to him, then it must have been to Mr. Trask and Mr. Loring who he says started the maps.

He speaks of an old map, but tells nothing about its contents. Is it not just possible that this mysterious map that the defendants neglected to put in evidence, that his witness neglected to give any particulars of, is the map whereon Mr. MacDonald pointed out to Mr. Sweeny that the course of drill hole No. 2, if continued, would penetrate the Ella ground? Mr. Miller says he found it there before the time that Mr. MacDonald testifies that he pointed out the course of that drill hole on the map to Mr. Sweeny, viz.: when they came into possession at Burke (see page 717, Vol. II, Trans.). But let us go a step further. Mr. Culbertson testified (see page 229, Vol. I, Trans.):

"A. The first map that was made did not contain a true "and correct condition of the property.

"Q. Was it practically true? Was the purpose of it to show "the correct condition?

"A. Why, it was supposed to be at the time it was made.

"Q. Who made it?

"A. A man by the name of McCormack.

"Q. What did he make it from?

"A. *From a survey.*

"Q. *A survey that he made?*

"A. *Yes.*

"Q. Was that survey afterwards checked up by anybody?

"A. Yes.

"Q. By whom?

"A. By a man by the name of Smith.

"Q. When?

"A. In October or November of that year."

Now, if Mr. McCormack made a map "from a survey," how could he make it without connecting with the surface lines or with the lines as established by the old map, which were necessarily connected with the surface lines The McCormack map was made before the complainants sold their interests; that is, before October.

This is conceded by Mr. Culbertson. He says it was made in September, 1899, he thinks, (see page 228, Vol. I, Trans.), though he fails to mention Mr. Booth, whose affidavit shows he began work September 1st, 1899, as a surveyor for the defendant companies, no doubt taking McCormack's place (see Booth's affidavit, printed in separate volume of transcript). Mr. Culbertson testified that there were some inaccuracies in the work of Mr. McCormack, but they were not discovered until Mr. Smith became employed by the defendants, and Mr. Smith testified that he did not work for the Buffalo Hump Company at Burke until November or December, 1900. But in contradiction of this, Mr. Smith testified (see page 707, Vol. II, Trans.):

"Q. Did you find any of his (McCormack's) work in "the office?

"A. I think I did; some notes.

"Q. Were you ever called upon by the company or any "of its officers to check up McCormack's work?

"A. No, sir.

"Q. You never were?

"A. No, sir.

"Q. Quite sure of that?

"A. Yes, sir; in this mine I am sure of it."

From this it will be seen that Mr. McCormack's work was considered all right for about a year; his work was relied upon and used by the defendants at least until long after the time of purchasing from complainants. Upon his work, evidently, the properties were all bought. It is shown that in the Ella and Missing Link no intermediate levels were run between the eight and the twelve hundred, and that no other level in the Poorman mine was extended to within several hundred feet of the Ella west line, except the twelve hundred. The six and eight hundred in the Ella had been connected with the surface lines by Miller, Loring and Trask, and therefore there was no occasion for Mr. McCormack to make any survey or surface connection at that point. No other level having extended to within several hundred feet of the Ella west line except the 1200 and that having been pushed clear through both the Ella and the Missing Link into the O'Neill during the time when Mr. McCormack was in the employ of the defendant com-

panies as surveyor, and during the time when he says he made a map "from a survey," we think it is conclusively shown by the record that Mr. McCormack made a survey of the 1200 through the Ella and Missing Link, and just how he could make that survey without connecting with the surface lines we are unable to state.

Certainly the main working shaft on the consolidated properties had been established and sunk with reference to the surface lines. How long would it have required to connect the 1200 with it?

Mr. Culbertson then testified that Mr. McCormack was discharged. The conclusion we reach is that he, having made this map "from a survey" and the ore having been found in the drill holes within the Ella ground, he knew too much to be of any further use. They may not have known him well enough to retain him pending the purchase of complainants' property. The defendants had to know their men.

The McCormack maps were evidently suppressed from Mr. Booth, who was the next engineer to succeed him. In his affidavit he says not a word about them. (See affidavit of A. A. Booth, printed in separate volume of the transcript). It is fair to infer that if Mr. McCormack's work had been given to Mr. Booth and had there been any inaccuracies in the work, he would have discovered it, and not Mr. Smith, who succeeded Mr. Booth twelve months after Mr. McCormack disappeared from the scene, and if Mr. Smith did discover the inaccuracies

said to exist in Mr. McCormack's work, it must have been at least twelve months after the time Mr. McCormack did the work, because he was not employed until about that length of time thereafter, and it could not happen in November or December of 1899, as stated by Mr. Culbertson. (See pp 229-30, Vol. I, Trans.)

Mr. Miller testified that he found an old map, says he did not know who made it and no one has stated where it came from or who made it. Why this uncertainty? It was defendants' map, and in their possession. They are claiming to be innocent parties. Why do they give the Court a small part of the testimony, just enough to create confusion, and stop there? Mr. Culbertson and Mr. Miller testified that the Poorman-Tiger did not do much surveying, that the Company was hard up, but it was certainly not a very big job to survey that one level. But whether the survey had been made or not, the Buffalo Hump Mining Company knew the Ella lines apparently well enough to start drill hole No. 1 and drill hole No. 2 beyond and outside of the east end line, and they appear to have known that line well enough to have drill hole No. 2 not only start without that line, but to carefully penetrate the ore body within the Ella a very few feet from its east end line. The Ella and Missing Link are about 200 feet in length, along the course of the vein. They seem to have known this too, because they dropped back from drill holes one and two 210 feet so as to clear the west line of the Ella, and there they start to cross-cut within their own ground and give it (the cross-cut) such a course and di-

rection as to strike the ore body less than 18 inches inside the west line of the Ella (see p. 210, Vol. I, Trans.).

Again Mr. Culbertson testified at pp. 242, 244, Vol. I, Trans., that he kept Mr. Patrick Clark advised, and talked freely to him about the work on the 1200, while the "abandoned drift" was being pushed through the Ella and Missing Link ground. If the defendant companies didn't know the lines and if no survey had been made connecting with the surface lines, how was Mr. Culbertson able to advise Mr. Patrick Clark as above stated?

Defendants' answer states that the ore was penetrated on the east end of the Ella and within the Ella "because of the care-"lessness on the part of the drill men * * *" This is very inconsistent with the theory that the defendants did not know the lines, and is an express admission that they did know the lines, and that the drill man in violation of instructions took the wrong course for his drilling.

Mr. Culbertson testified (see page 228, Vol. I, Trans.) that the defendant companies always kept a progress map. Mr. Smith testified (see page 704, Vol. II, Trans.):

"Q. You have testified that you made the progress map kept "by the companies. Where is that map?

"A. I have copies of it in our office here. The principal "map, the working map, is in Burke.

"Q. You have copies of it in this office in Spokane?

"A. Yes, sir.

"Q. Can you produce us a copy of that progress map after "lunch or during the day or during this session?

"A. I can.

"Q. Will you do so?

"A. I don't know.

"MR. STOLL: Mr. Heyburn, we demand that you produce "us this afternoon or before the termination of this session and "before we are through with the examination of this witness, "copy of the progress map.

"MR. HEYBURN: I have offered it in evidence this morn- "ing and you have it here now.

"WITNESS: Not the progress map.

"MR. HEYBURN: Is not that the progress map up to "date?

"A. It is up to date, but it does not show the *progress of "each month.*

"MR. STOLL: We want the progress map to which he has "testified.

"MR. HEYBURN: Sufficient unto the day is the evil "thereof. You have made your demand."

The day came, but the map never. Was the Circuit Judge, in the face of this evidence, justified in concluding that Mr. MacDonald was unable to point out on the map to Mr. Sweeny the course of drill hole No. 2, demonstrating to him that it would go through the Ella if continued in the direction that it started? We think not.

If the defendants were innocent, as they claim they were, of any wrong in the premises, if they did not deliberately prospect complainants' ground with a diamond drill for the purpose of defrauding complainants, if they thought the drill work was

within their own grounds, why should they suppress the progress map; why should they not bring to the aid of the Court every possible piece of testimony in their possession; why did they start without the Ella east line and within the O'Neill lines and start the drill so as to strike the ore body a very few feet within the Ella lines? Having done that, why did they drop back 210 feet and start their cross-cut at such a convergent course that it would intersect the line of drill hole No. 2 if driven about 325 feet, and why is this cross-cut so carefully arranged and planned that it dropped upon the ore body immediately upon the Ella west line? Why is drill hole No. 2 started the same distance east of our east line that the cross-cut is started west of it (a scale put upon any of the maps will demonstrate this) and having discovered the ore at our line, why did the defendants drive through it into the Ella ground, a distance of about 20 feet, before they were sufficiently satisfied with it to make the purchase. It seems to us that this shows not only that a survey had been made, but that the survey was exceedingly accurate. Mr. Booth states (in his affidavit printed in separate volume of the transcript) that he started a *progress* map in September. Mr. Miller states that the old map he found was a *working* map. The lines on the 600 and 800 were established by Messrs. Loring, Trask and Miller, as heretofore shown by Mr. Miller's testimony. There was no other level at the time Mr. McCormack worked there up to the east end line of the Poorman except the 1200. The ground was caved in on the upper levels so that they could not get into the 600 and 800

until about two years after Mr. McCormack left the employ of the company. Therefore it does not require any great amount of speculation to determine upon what level Mr. McCormack made his alleged error of 10 feet in locating the east end line of the Poorman.

Mr. Miller testified at page 946, Vol. III, Trans., as follows:

"That from the month of July in the year 1899 to April, 1901, "he was consulting engineer of the Tiger-Poorman mines, then "owned and operated by the Buffalo Hump Mining Company, "the defandant herein; that affiant was, during the year 1894 "and until January 10, 1895, acquainted with the mining claims "mentioned in the complaint and called the Ella and Missing "Link lode claims; that during all of said time he has been "thoroughly conversant with the nature, character and extent of "the development work upon said mining claims and all of "them, the nature, character and value of the ores extracted "therefrom, plans of operation and projected plans of operation "of said mining claims and property."

It will appear from the map that drill hole No. 2 and hole No. 3, 210 feet apart, are parallel, or practically so. Mr. Culbertson has testified at p. 215, Vol. I, Trans. (we quote only a portion of his answer):

"We found ore in all three of these holes, and the object of "starting this cross-cut, which is known as the south cross-cut, "from the 1200 was because it was, you might say, in the mid-"dle of the two holes or midway between them.

"MR. HEYBURN: That is, midway between drill hole No. "2 and drill hole No. 4?

"A. Yes sir, practically so, not exactly * * *"

And again at page 217, Vol. I, Trans.:

"We had a little ore in each of them (referring to drill holes "2 and 4). The object was to strike the *body of ore* some- "where near the center as shown by the drill hole, and it was "for that reason that the hole (cross-cut) was started there."

Evidently the defendants were very wise underground calculators, or else they had, prior to that time, had a very accurate survey, because the cross-cut (which was started within their own ground) indicates that the ore was struck (within complainants' ground) at the place they intended to tap it, viz., practically midway between these two holes. (See map.)

Mr. Culbertson testified that the first knowledge that they had of the fact that the Ella ground had been penetrated by a diamond drill was in October when a survey disclosed that fact (see p. 211, Vol. I, Trans.) as follows:

"Q. When did you first know that it had penetrated the "Ella ground?

"A. Not until after we had run the cross-cut and had had a "survey made.

"Q. About when was that survey made that first disclosed "that fact?

"A. In October.

"Q. What time in October; before or after the purchase "of the Ella claim?

"A. Well, *I couldn't state that with any degree of certainty "without having access to the books up there.*"

It is uncontradicted that complainants' deed was not delivered until the 20th of October, and that the consideration did not pass until that day. Here is an admission of Mr. Culbertson

under whose direction the drilling was done that the survey made in October disclosed that they had penetrated the Ella property, and a further admission that their books would show when that survey was made, but they do not produce the books, and again, *as in the case of the progress map,* they leave uncertain that which they could have made absolutely certain by testimony *in their exclusive possession,* had they been disposed to deal fairly with the Court and the parties to the litigation. The inference in a court of equity is that this proof would have been against them. See authorities, *supra.*

In connection with this east end line of the Poorman, it is worthy of notice that the defendants were all the time hunting for and concerned about the east end line of the Poorman; the west end line of the Poorman seems to have been overlooked entirely. Whether the defendants, or any of them, knew where the lines of the Poorman and the Ella were or not, is quite immaterial in law. They were bound to know where they were, and it is no excuse or defense for them to say that they committed these trespasses ignorantly.

In Tennessee, a coal mining company, mining underground, was approaching one of its terminals; instructions were given to the foreman not to cross the boundary line, but to leave a margin. The foreman testified that he did step the distance on the surface, but was deceived in the direction of the first branch, and the miners began to talk about the mine having crossed the boundary. Under these circumstances, complainant sent an en-

gineer, who did actually measure the surface of the ground. As a result of his survey, he reported to the defendant that the first branch was over the line twenty-seven (27) feet, but that the other branches were not, and he told the defendant's foreman how far he might safely go. Work was at once stopped in branch No. 1 and never resumed. The other branches were continued within the limits designated by the engineer. After commencement of the litigation the same engineer made a new survey of the surface and found that he was in error as to his first survey about eleven and one-half (11 1-2) feet, to that extent increasing trespass on complainant's land and the amount of coal mined. The evidence was clear that neither the defendant nor his foreman intended to or did permit the working of the branches beyond the points designated by complainant's engineer. Upon these facts, the Supreme Court in Coal Creek Min. & Mfg. Co. vs. Moses, 15 Morrison's Mining Reports, 544, (54 Am. Rep. 415) thus decided the rights of the parties:

"Upon the foregoing facts we may say that it was the duty "of the defendant in the first instance to have made the nec- "essary surveys to prevent any encroachment upon the land "of complainant. He was in fault in not so doing, and he was "also in fault in not keeping accurate accounts of the coal "mined in each of the branches in the vicinity of the boundary "line. For these omissions of duty on his part the master was "clearly right in construing the evidence liberally against him."

To same effect, and a still stronger announcement of the rule, is Durant Min. Co. vs. Percy Consol. Min. Co., 35 C. C. A.,

252; Golden Reward Min. Co. vs. Buxton Min. Co., 38 C. C. A., 228.

How the Circuit Judge, after announcing the following rule of law, can still consistently enter a decree for the defendants, in the face of the testimony, we cannot understand, viz.:

"Were I convinced that this work had been done clandes-"tinely and with a view of taking advantage of the complain-"ants, I should hold that a purchase without a communication "of all the facts to the seller should be rescinded."

What meaning has the term "clandestine?" Webster defines it as follows:

"Conducted secretly; withdrawn from public notice, usually "for an evil purpose, kept secret, hidden, private, underhand; "as a clandestine marriage."

Was this not done secretly? Does not Mr. Culbertson testify that before the strike he talked freely with Mr. Patrick Clark, and that after the strike he never told him anything at all? Does not Mr. Culbertson testify on behalf of defendants that the drill cores were given to him by the drill gang, and that he put them in a sack and then in a locked cupboard, and that no one else had access to them except Mr. Sweeny? (See page 944, Vol. III, Trans.) Was the work not done 1200 feet under the surface of the earth, with no means of ingress or egress except through the workings owned by, and in the exclusive possession of, defendants? Did they not commit trespasses on our property under the cover of this big mountain that lay between the shining sun and the point where the drill hole pene-

trated? Did they tell anybody? Did Mr. Culbertson not say, at page 213, Vol. I, Trans., that "We were *not publishing re-*
"sults?"

Did not Mr. Sweeny testify at p. 901, Vol. III, Trans., that:

"Q. Now, Mr. Sweeny, I would like to have you give me "a direct answer to this question if you can do so. Do you think "you had a right, and that it was quite fair dealing for you to "prospect at depth in adjoining ground to that which you "owned, and then attempt to purchase either that or the adjoin-"ing ground to that without advising the parties from whom "you were purchasing as to what you had done —

"MR. HEYBURN: I object to that as immaterial.

"Q. (The question was read).

"A. Had a right to try to purchase it? Well, I didn't think "there would be anything very wrong in that, no.

"Q. You didn't think, what?

"A. I didn't think there would be anything very wrong about "that if I operated in my own territory, and from operations in "my own territory got an idea as to what other things were "worth, I certainly would not go on telling the whole United "States about it so that they could come around and *place all "kinds of values on it, if I wanted to buy it.* It would not be "business."

Did not Mr. Sweeny in addition also state to Mr. Joseph MacDonald not to state anything about the strike, as he wanted to buy the complainants out for a song?

The testimony upon this subject, to which the Circuit Judge no doubt refers, is the testimony of Mr. Charles Sweeny (see p. 903, Vol. III, Trans.):

"Q. You must necessarily have known that you had gone "through the Ella.

"A. No, sir.

"Q. In order to get to the O'Neill?

"A. Oh, we passed through it in the drift, certainly.

"Q. And you were using that drift for the purpose of pros- "pecting to the south?

"A. We were using privileges that were opened to go "through there.

"Q. You were using this drift through the Ella?

"A. *It is evident from all the evidence that the Poorman- "Tiger drove these drifts and we owned the Company and were "entitled to go through unless somebody objected.*

"Q. And nobody did object?

"A. No, sir."

Mr. Culbertson testified (at p. 242, Vol. I, Trans.):

"Q. When was it Mr. Clark authorized you to run through "the 1100 or 1200 foot level into the Ella?

"A. He never authorized it.

"Q. He never authorized it?

"A. No.

"Q. I understood you to say that he gave you permission or "authority or directed you to do it?

"A. No, we took it."

The policy of the Tiger-Poorman Company, dominated as it is claimed by Mr. Culbertson, is not only approved but is continued by Mr. Sweeny on behalf of his companies immediately upon succeeding to the ownership of the property.

In this connection it is worthy of note that the defendants started drill hole No. 2 thirty feet east of our east line, and the cross-cut the same distance (thirty feet) west of our west line. If this is a coincidence it should be considered in connection with the many other coincidences in this case.

Mr. Sweeny claims that his company owned the Poorman-Tiger Company and therefore was entitled in law to go through there unless somebody objected, and he says nobody did object. This is equivalent to ratifying whatever may have been done by the Poorman-Tiger Company, which Mr. Sweeny says his company at that time owned. He claims his rights and privileges, whatever they were, by virtue of trespasses that had been committed by the former company, to which he was the successor. He makes no claim or pretense that *the complainants knew he was using this drift or that they acquiesced in it*, and in that regard the Circuit Judge has drawn a conclusion not warranted by the evidence. His right to use that drift is no greater than the right of a man, who finds a house open, to move in and occupy it because there is no objection. Who could object? How could any person get on the ground to object without going through the private openings—the shraft and drifts of the defendants who were committing the trespass? But assume that the defendants, having found this drift there, were not guilty of a trespass in simply using it to pass to and fro from the O'Neill claim to their shaft in the Poorman. Is it going to be contended and claimed to be the law that, *for that reason,* they had a right to use that drift, without our knowledge, or

permission, for the purpose of prospecting our ground? The Circuit Judge finds that their prospecting in that vicinity was not clandestine and therefore not unlawful *because they found the drift there.* We cannot conceive how the finding a drift through our property, admitting the assumption that it was put there by another trespasser, can excuse the defendants in their trespasses, or warrant the conclusion that the defendants' exploitation of our ground was less unlawful than it would otherwise have been. But if we concede, for the purpose of the argument, all that is contended for by the defendants or concluded by the Circuit Judge in that regard, how does it justify the defendants in starting the cross-cut about 30 feet to the west of our west lines, upon defendant's own ground, equi-distant from the working found by Mr. Sweeny, and drive their cross-cut into our grounds? Defendants made no use of the workings which it is claimed Mr. Sweeny found on our ground to drive that cross-cut. After driving it 47 feet through their own grounds, they deliberately crossed our line, found the ore body on our side, and took possession. This is the possession, the only actual possession (*possessio pedis*), the defendants had, and this possession the Circuit Judge finds was not clandestine because Mr. Sweeny found some workings on our ground about 30 feet distant easterly therefrom.

How the Circuit Judge harmonized the conclusion made by him, *supra*, (1) with the citation of authority made by him, to-wit, Loehr v. Harris, *supra*, we do not know, but if additional authority is necessary to show the application of the doc-

trine of that case to the facts as found by the Circuit Judge, we cite the case of Stewart v. Wyoming Ranch Co., 128 U. S., 388, where Mr. Justice Lamar, on behalf of the Court, used this language:

"In an action of deceit, it is true that silence as to a material "fact is not necessarily, as a matter of law, equivalent to a false "representation. But mere silence is quite different from con- "cealment. *Aliud est tacere, aliud celare;* a suppression of the "truth may amount to a suggestion of falsehood. And if with "intent to deceive either party to a contract of sale conceals or "suppresses a material fact which he is in good faith bound to "disclose, this is evidence of and equivalent to a false repre- "sentation, because the concealment or suppression is in effect "a representation that what is disclosed is the whole truth. The "gist of the action is fraud producing a false impression upon "the mind of the other party, and if this result is accomplished, "it is unimportant whether the means of accomplishing it are "words or acts of defendant, or his concealment or suppression "of material facts not equally within the knowledge or reach "of complainant."

In Laidlow vs. Organ, 2 Wheaton, 178, Chief Justice Marshall announced a similar rule, thus:

"The question in this case is whether the intelligence of ex- "trinsic circumstances which might influence the price of a com- "modity, and which was exclusively within the knowledge of "the vendee, ought to have been communicated by him to the "vendor. The Court is of opinion that he would not be bound "to communicate it. It would be difficult to circumscribe a con- "trary doctrine within the particular limits *where the means of "intelligence were equally accessible to both parties*, but at the "same time *each party must take care not to say or do anything "tending to impose upon the other.*"

It will be noted that the Circuit Judge advised the Clerk not to send up as a part of the transcript the affidavit of Mr. Booth for the reason that he had not considered it upon the trial, and that for that reason it was not a part of the testimony in the case. The failure of the Circuit Judge to consider this affidavit which is a material part of the testimony is, we think, gross error. At pp. 89 and 90, Vol. I, Trans., will be found "Stip-"ulation as to Complainants' Evidence." We quote a part of it:

"It is hereby stipulated and agreed that the complainants "may offer in evidence such further documentary evidence * "* *, the same to include * * * together with all the "files, records and notices of every kind and nature served in "this case and now upon the files herein * * *"

This affidavit being filed by the defendants in opposition to an application for a receivership herein, is clearly admissable under this stipulation *as against them*. True, they could not offer it in evidence, but we can offer it in evidence for the purpose of contradicting testimony subsequently offered by them, being statements made by them against interest.

III. Was the Circuit Judge justified in concluding that "Complainants made no sufficient "effort prior to the sale to ascertain the value of "the property?"

The bill charges, and the answer admits (see paragraph V of the bill and paragraph V of the answer), that the only means of access to the underground workings in the Ella and Missing

Link claims was through the main working shaft sunk on the Tiger mine, one of the properties of the Buffalo Hump Company, and that the shaft and all of the drifts connected with it were in the exclusive possession and under the control of the Buffalo Hump Company. The only means of examining the underground workings of the Ella and the Missing Link claims to ascertain if any trespasses had been committed upon them, and if any ore had been discovered within them, was through the works of the Buffalo Hump Company. We had no right *in law* to demand of the Buffalo Hump Company the use of its shafts and drifts for that purpose. We had no right to examine their works. The drill hole did not start in our ground nor did the cross-cut, therefore we had no right to enter either, and beyond that there was nothing to examine save a barren drift. If Mr. Sweeny had stated to us the whole truth, and had not made any false representations to us, we would probably not have been denied admission through the shaft into the underground works on the Ella. But suppose that, as we now contend, he had stated to us a falsehood. Is it probable that the Buffalo Hump Company, of which he was the dominant spirit and general manager, would have given us the use of its shaft and drifts to expose the fraud that Mr. Sweeny was attempting to perpetrate upon us, when it was not required to do so in law. It is in evidence, both by Mr. Sweeny and Mr. Culbertson, that at that time they did not know, and the Buffalo Hump Company did not know, where the Ella and Missing Link lines were, and this, too, *when they were working exten-*

sively at the east end of the Poorman (one of their mining claims), *and the west end of the O'Neill* (another of their mining claims), *between which two claims the Ella and Missing Link lie.* Mr. Sweeny and Mr. Culbertson have both testified that they knew that the Ella and Missing Link claims lay between the O'Neill and the Poorman. Defendants' witnesses testified that in the summer and fall of 1899 the Buffalo Hump Company had in its employ Messrs. McCormack, Booth and Miller as surveyors and engineers. They have shown that they had maps of the mines, and yet they were unable to state where the lines of the Ella and Missing Link were. How, then, were we expected to go down *their* shaft, through those long, circuitous drifts, all unknown to us, and discover the *locus* of the Ella and Missing Link. It is in evidence that on the 1200 the drift runs from the main shaft of the Tiger without a break clear into the O'Neill. How were we to determine what particular part of this drift contained the Ella and Missing Link? And suppose that we had found the lines of the Ella and Missing Link on the 1200, how were we to determine what discoveries were made within them? A drill hole had been bored, it is true, (drill hole No. 2) but that hole was started about thirty feet without the Ella and Missing Link lines and it would be a wise man who could guess the course of that drill hole to be so far divergent from right angles with the drift as to carry it within the Ella lines, assuming him to be wise enough to discover the drill hole upon the wall of the drift. Would the defendants have pointed out the drill hole to us without our asking? Would

we have been able to have inquired about it without knowing of its existence?

But the other side will say that we might have ascertained the condition of the property from the cross-cut that struck the ore on the west end of the Ella. Mr. Sweeny has testified that his conversation with Mr. Patrick Clark took place on the 4th or 5th of October, at which time the cross-cut had not reached the ore. The ore was reached on the 8th of October. (See evidence of Mr. Thos. Jay, defendants' foreman, at page 427, Vol. I. Trans.) Therefore, at that time, it would have been quite useless to have examined the cross-cut, because the ore was not struck until the 8th of October; beside, the cross-cut was not started within our ground and while we were entitled, had we known of its existence, to examine that portion which penetrated our ground, how were we to do so except by procuring a license from the Buffalo Hump Company to enter its cross-cut started within its grounds?

We had no right to examine *their property*, *their cross-cuts* and *drifts* made in *their mine*. This cross-cut started about 30 feet within *their lines* and *outside of ours*. It was run directly at right angles with the drift, a very different angle from drill hole No. 2, and nothing about it to indicate to us that it was so carefully planned and arranged that it should drop upon the ore body immediately upon or within our line, and therefore we could not have advised ourselves of the condition of our property from an examination of the cross-cut, even though it had been in the ore at that time. It is earnestly contended by the

other side, and we must concede the law to be, that the defendants were not required to advise us of the condition of the ore bodies *lawfully* found by them within their own property, although within a few feet—yea, a few inches—of our lines. But, standing as they do, so strictly upon this technical rule that approaches very closely to the danger line, even in the abstract application of it, is it possible that the defendants would have allowed us to examine this cross-cut, starting within their lines, and tapping a part of the ore body within our lines?

It will appear from the testimony of Mr. Ralston, also Mr. Harvey, one of the complainants herein, that when they examined the Ella and Missing Link under the order of the Court, they were not allowed by defendants to pass beyond the east line of the Missing Link, nor to make any examniation of any ore body west of the west line of the Ella (see p. 621, Vol. II, Trans.). If, after a suit is brought charging fraud and the defendants are called upon by the highest considerations, not only to exonerate themselves, but to satisfy the Chancellor of their contention, they draw such fine distinctions and stand so technically upon their legal rights, by what line of reasoning are we warranted in the conclusion that prior to the time they were charged with this fraud they would have been more liberal in allowing us to examine the approaches to our ground on either side?

But assume that the defendants were, as we claim, intending to perpetrate a fraud upon us, and suppose that we indicated that we did not believe the statements made to us by their gen-

eral manager, and that we wanted to make an examination ourselves, could the defendants not easily have timbered and lagged up tightly a section of the 1200 foot level, say 100 feet in length, including the point at which the cross-cut was started, and thus have prevented us from ascertaining anything that was found in it, or any knowledge of the fact that it had ever been run? We would never think of pulling out the lagging to examine, if at all, anywhere except within our own lines, nor would we have the right to ask for an examination of anything without our lines. We would hardly be expected to infer that a cross-cut started within their lines intersected an ore body within our lines. In other words, the peculiar conditions surrounding this situation were such that an examination would not have been practicable, and would simply have aided defendants in their unlawful scheme. If we had attempted to make an examniation, we would not only have been unsuccessful, but we would now be confronted with that other rule of law to the effect *that we did not rely on the statements of Mr. Sweeny, but acted upon our own information.* In the face of the positive statements made by Mr. Sweeny and Mr. Culbertson, in no event was it necessary in law for the complainants to have made an examination or to have made inquiries, even though it had been practicable. The rule is very forcibly stated by the Supreme Court of Kansas in Speed vs. Hollingsworth, 38 Pac., 497, and is supported by the best considered American cases, as follows:

"The trend of the decisions of the Courts of this and other "states is towards the just doctrine that where a contract is

"induced by false representations as to material existent facts, "which are made with the intent to deceive, and upon which "the plaintiff relied, it is no defense to an action for rescission "or damages arising out of the deceit, that the party to whom "the representations were made might with due diligence have "discovered their falsity, and that he made no searching inquiry "into facts. 'It matters not,' it has well been declared, 'that a " " 'person misled may be said in some loose sense to have been " 'negligent: * * * for it is not just that a man who has " 'deceived another should be permitted to say to him, "You " ' "ought not to have believed or trusted me," or "You were " ' "yourself guilty of negligence." ' "

The Court then cites Bigelow, Frauds, 523, 528, 534.

Kerr, Fraud & Mistake, 80, 81.

Pomeroy vs. Benton, 57 Mo., 531.

Redgrave vs. Hurd, 20 Ch. Div., 1.

Simar vs. Canaday, 52 N. Y., 306.

Schumaker vs. Mather, 133 N. Y., 590.

Redding vs. Wright (Minn.), 51 N. W., 1056.

Ledbetter vs. Davis, 121 Ind., 119.

Furnace Co. vs. Moffatt, 147 Mass., 403.

The Supreme Court of Oregon in Cawston vs. Sturgis, 43 Pac., 656, uses this language:

"To turn him out of Court under such circumstances, be- "cause he did not go to the trouble and expense of having "the area of the land ascertained by actual measurement, but "chose to rely upon defendant's representations, would be offer- "ing a premium upon fraud and deceit. Mere knowledge of "the boundaries did not charge him with knowledge of its area, "so as to relieve the defendant from responsibility from his

"false and fraudulent representations in reference thereto," citing numerous authorities.

Judge Sutherland, in his work on Damages (see Vol. 3, page 586, 1st Ed.), announces the rule thus:

"If the facts are not known to him, and he has not equal "means of knowing the truth, there is no legal duty not to rely "on the statements of the other party."

Roberts vs. Plaisted, 63 Me., 335.

Savage vs. Stevens, 126 Mass., 207.

Greens vs. Hallenback, 24 Hun., 116.

Where the representations related to the size and location of lots which were the subject of negotiation it was held in Minnesota that the plaintiff could not be charged with negligence for relying upon the representations instead of consulting the recorded plat.

Porter vs. Fletcher, 25 Minn., 493.

In Illinois it was held that where the land relative to which the representations were made was only six miles away, the plaintiff had a right to rely on the representations.

Nolte vs. Reichelm, 96 Ill., 425.

And so in Massachusetts, where the matters were peculiarly, though not exclusively, within the knowledge of the defendant.

Nowlan vs. Cain, 3 Allen, 261.

The purchaser of an interest in goods has a right to rely on the seller's representations that he is the owner; and he is not

negligent if he fail to test the correctness of such representations.

Hale vs. Philbrick, 42 Iowa, 81.

The Court say: "We are not inclined to encourage falsehood "and dishonesty, by protecting one who is guilty of such fraud, "on the ground that his victim had faith in his word, and for "that reason did not pursue inquiries that would have disclosed "the falsehood."

Bondurant vs. Crawford, 22 Iowa, 40.

Van Epps vs. Harrison, 5 Hill, 63.

Bank of Woodland vs. Hiatt, 58 Cal., 234.

The constructive notice by the record of a mortgage will not deprive a purchaser of the right to rely on the vendor's positive statements, fraudulently made, that the property is unencumbered, nor will it prevent him from suing for the false representations.

Weber vs. Weber, 47 Mich., 569.

Mr. Sweeny has testified, and the Judge of the Circuit Court found, that it was the purpose of the Buffalo Hump Company to purchase a large amount of ground in and around the Tiger and Poorman mines, simply for their surface value, and not because of any ore values, and that pursuant to such policy, it did purchase a large amount of ground. The Buffalo Hump Company also bought from the complainants in this case the Sheridan, which never had any value as a mineral claim, simply valuable for the surface, and paid practically the same price for it that they did for the Ella and Missing Link. Therefore, Mr. Sweeny's statements to Mr. Patrick Clark that he only

bought the Ella and Missing Link because of their situation and the surface value that they had, is very plausible, is a story that would allay suspicion if any existed, and is calculated to throw a diligent man off his guard. The statement of Mr. Sweeny that they were not worth $15.00 as mineral claims confirmed a preexisting opinion by Mr. Clark to the same effect, as he, while manager of the old Poorman Company, discontinued work on the 800 foot level because the ore had been practically exhausted. Mr. Culbertson testified (see page 239, Vol. I, Trans.) that he did not think the Ella and Missing Link had sufficient value when his interest was deeded to him to justify him in recording his deed, and then said:

"The actual value at that time was very small, from the fact "that the ore had been practically worked out of the ground."

Mr. Culbertson testified at page 208, Vol. I, Trans., and here he shows defendants to be guilty of a trespass due to wanton recklessness, equally culpable with a trespass committed willfully:

"Q. At the time you selected or determined upon the di- "rection of that drill hole did you have in view the question of "the Ella or Missing Link claims at all?

"A. No, sir.

"Q. What were you boring for?

"A. We bored the hole out there simply from the fact that "it was the furthest drift out in that vicinity * * *"

And again at page 209, Vol. I, Trans.:

"Q. Now state if you knew at the time you drilled that "hole that it entered the Ella or Missing Link claims at all.

"A. I did not know it at all.

"Q. Did you intend it at the time you drilled it?

"A. It was not drilled with that intention. It was simply "drilled from the fact that it was the furthest working east. "We wanted to cross-cut it * * *"

Page 246, Vol. I, Trans., he says:

"Well, we were just naturally drifting that way; we didn't "know where we were."

At page 898, Vol. III, Trans., Mr. Sweeny testified:

"Q. You didn't care anything about where you were tres- "passing?

"A. Well, we were buying all the ground and it didn't make "any particular difference where it was."

Mr. Sweeny in his affidavit, (see page 1001, Vol. III, of the transcript) used this language:

"But had any of the said complainants at any time requested "information as to the said developments it would have been "cheerfully given them."

What would have been given them? How could he have given us anything? What did he know to give? Has he not before stated, and did not Mr. Culbertson also testify, that they did not know where the lines were, that they did not know that they were working in our ground? Did Mr. Sweeny mean to be understood that he would have advised us of the condition of the adjoining ground in the Poorman on the one end, and the O'Neill on the other, if we had asked him? If so, he has changed his attitude very materially and very frequently.

IV. Clark Stopes and Ore Showings there.

It is contended by the other side, and in fact the principal defense to this case is, that the complainants had worked out the premises in controversy to the 800 foot level, and that in doing so they had familiarized themselves with the premises so that they should not have been imposed upon. The further contend and attempt to show that the ore struck on the 1200 by the diamond drill and the cross-cut is a continuation of the vein which they worked on the 800. They further make an attempt at showing that there is merchantable ore in the stopes at the point where the complainants discontinued work on the 800. And the suggestion is made, we think by Mr. Miller, perhaps one other also, that the ore there is as good as at some places in the Ella further down. For the purposes of the argument, let us assume that there was sufficient ore in the 800 to justify mining when the complainants discontinued work there. Mr. Culbertson has testified, as we have shown before, that he notified Mr. Patrick Clark and Mr. Harvey, two of the complainants, that on the 1200 they had run through the Ella on a mere stringer and found no ore. Now, there could be no dispute about that; Mr. Culbertson testified to that himself. The thing that gives value to a mine is not the immediate bunch of ore that you may have in sight at a given place, but the continuity of the ore body vertically and longitudinally. The stopes on the 800 were short. Between the 800 and 1200 is 400 feet, and if in that distance the ore, which, according to the testimony

of these witnesses was far from promising, had entirely discontinued, it would be about the most depressing condition that could possibly affect the mine; while upon the other hand, if complainants had known that 4 feet further in the earth, to say nothing about 400, the ore body had widened to 10 feet, 6 feet of which was shipping ore, see the difference in effect it would have had, not only upon the value, but upon the prospects of the property; and while this argument is entirely sound, we are not driven to it. Mr. Culbertson testifies that the only value that was attached to the property at the time of his conveyance was a prospective value. At page 239, Vol. I, Trans., we find him testifying as follows:

"Q. Tell us what value you placed on it? What did you "think it worth? A. I thought the prospective value might "be considerable. The actual value at that time was very "small from the fact that the ore had practically been worked "out of the ground. We desired the ground as a body of ore "might be found down below, and I felt a reasonable assurance "of finding something down below the 800 where Mr. Clark "had worked."

Mr. Miller and Mr. Cartwright have testified to finding merchantable ore in the Clark stopes, but we call the Court's special attention to the fact that they particularized nothing; they stated generally that it was merchantable ore, that it was as good as was found farther down in the mine afterward. In other words, they state conclusions; they state no facts from which the Court can draw its own conclusion, yet Mr. Miller testified that the ore over the 1100 only averaged two feet, while

below the 1100 it averaged four and a half to five feet. (See pp. 726-7, Vol. II, Trans.) And again they testified to digging some trenches in the floor of the Clark stopes, and that in the trenches they found something like two feet of very good ore. But Mr. Cartwright, at page 827, Vol. III, Trans., testified that these trenches were immediately covered up by direction of Mr. Miller, who was then the resident manager. When our engineer, Mr. Ralson, who was accompanied by Mr. James P. Harvey, made an examination of the Clark stopes on the 20th or 21st of January, Mr. Cartwright went with them; he gave them access to the stopes; but Mr. Cartwright himself testified that he never called their attention to the fact that a trench had been dug in the floor of the Clark stopes, or what he had found there, and that he, under the direction of Mr. Miller, had covered up his find, thus making it impossible for our witnesses to ascertain whether or not they were testifying to the truth. (See p. 825, Vol. III, Trans., Cartwright's testimony.) A pretty practice to engage in in a court of equity! Especially by parties charged with fraud, and quite in keeping with their conduct during the progress of this trial, and during the occurrences of the events which gave rise to this controversy.

Mr. Ralston with Mr. James P. Harvey made an examination of the Clark stopes on the 20th or 21st of January. Their testimony upon rebuttal (see pages 1056 and 1076, Vol. III, Trans.) was to the effect that a few very small seams and stringers of ore were found in the Clark stopes. Mr. Ralston made a drawing of each face and of the roof. These drawings

are in evidence. These witnesses state facts; they detail what they saw, with character and value, and let the Court draw its conclusion as to whether or not it is merchantable ore.

The defendants are in this attitude before the Court: The answer admits that the 800 stopes were worked out. About the middle of paragraph 5 of the answer of the defendants we find the following language:

"Deny that the complainants had done but little work on the "said Ella and Missing Link lode claims further than to make "assays and doing development work on the same; but allege "the fact to be that the complainants had practically mined out "everything of value in the said Ella and Missing Link claims "above what is known as the 800 foot level."

That is followed by the testimony of Mr. Culbertson, the assistant manager, to which attention has heretofore been called. It is also supported by the testimony of Mr. Patrick Clark and Mr. James P. Harvey. After the answer admitting, and after testimony of defendants' star witness had testified to it, and that testimony drawn from him by a direct question by defendants' counsel, we for the first time encounter an effort by the defendants to overthrow the whole thing, answer, testimony and all, and show that the ore up there was good enough to have put the complainants upon their guard. Evidently a desperate death struggle. We trust defendants may explain their attitude with reference to this matter to the Court, as to why they may mislead us with a sworn answer, and by direct testimony of their witnesses up to the time when the trial is practically closed, and then turn front entirely.

V. Was the Circuit Judge justified in concluding "that Complainants delayed an unreasonable "time (eighteen months) in bringing this suit?"

The Circuit Judge evidently did not make a very careful examination of the evidence in the case. It appears very plainly that the fraud in this case was not discovered until about April, 1901, less than two months prior to the bringing of this suit. At page 523, Vol. II, Trans., Mr. Patrick Clark testified as follows, and this is all the testimony either for or against the proposition in the record, to-wit:

"Q. When did you first learn of the fraud that had been perpetrated upon you by Mr. Sweeny and Mr. Culbertson?

"A. Some time last summer.

"Q. What time?

"A. Oh, along in April.

"Q. You mean of this year, 1901?

"A. Yes, sir."

Mr. Clark then testified that he had no knowledge of any fraud having been perpetrated upon him at the time when Mr. Culbertson invited him to visit the mine at Burke and that at that time he had no intention of going into the mine for the purpose of looking at the Ella, but for the purpose of determining whether the underground workings of the defendant companies were being extended into some ground belonging to the Poorman Extension Company, in which he was a big shareholder. (See page 523, Vol. II, Trans.) It is true, Mr. Clark testified,

that Mr. Sweeny told him that he had found an ore body 900 feet high, 600 feet long and 5 to 6 feet wide, and that he had it on all the various levels from the 1200 up; that he told him this within three or four months after he bought the Ella, but at page 523, Vol. II, Trans., speaking of this matter, Mr. Clark testified (and this is all the testimony there is on this question):

"Q. Where did he say—on what part of the claims did he "say?

"A. I asked him where it was, and he said it was in the "O'Neill ground. That of course aroused my curiosity as to "whether it might go into the Poorman Extension, and I asked "him.

"Q. What did he say about that?

"A. He said that it did not go in that direction, that it made "a turn and went around through the O'Neill ground."

Nor does it appear from any of the evidence in the case that Mr. Patrick Clark knew then or had any intimation that this ore body had been discovered prior to, or was known of by Messrs. Sweeny and Culbertson, at the time of the sale of the Ella. If it had been made thereafter, it would not have been fraudulent. Is two months an unreasonable time to delay in bringing suit for the cancellation of a conveyance after the discovery of the fraud? The statute of limitations of the state of Idaho allows three years in law cases to bring suits in cases of fraud. See Sec. 4054 Revised Stat., Idaho.

Within that period of time Mr. Patrick Clark was required to attend to the following details with reference to the bringing of

this suit: He had to consult with and employ counsel; he had to satisfy his counsel of the sufficiency of his evidence, and his counsel had in turn to marshal the facts, examine the law, prepare the pleadings, send them to Moscow for filing, have the writ of subpoena issued, returned and filed. Is two months an unreasonable time in which to do that? No intervening rights of innocent parties grew up in the meantime. No change in the condition of the property or in its ownership took place. The defendants in the meantime were extracting large quantities of ore and reaping splendid profits from the property.

In Michaud vs. Girod, 4 How., 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que trust*, a bill filed 36 years after the commission of the fraud was held not to have been too late. In that case, Mr. Justice Wayne, at page 560, used this language.

"In a case of actual fraud courts of equity give relief after "a long lapse of time, much longer than has passed since the "executors in this instance purchased their testator's estate. "In general, length of time is no bar to a trust clearly estab- "lished to have once existed, and where fraud is imputed and "proved, length of time ought not to exclude relief * * * "There is no rule of equity which includes the consideration of "circumstances and in a case of actual fraud we believe no case "can be found in the books in which a court of equity has re- "fused to give relief within the lifetime of either of the parties "upon whom the fraud is proved, or within 30 years after it "has been discovered or becomes known to the party whose "rights are affected by it."

So in Prevost vs. Gratz, 6 Wheat., 481, it was said by Mr. Justice Story:

"It is certainly true that length of time is no bar to a trust "clearly established, and in a case where fraud is imputed and "proved length of time ought not, upon principles of eternal "justice, to be admitted to repel relief. On the contrary, it "would seem that the length of time during which the fraud has "been successfully concealed and practiced is rather an aggrava- "tion of the offense and calls more loudly upon a court of "equity to give ample and decided relief."

To the same effect, see Baker vs. Whiting, 3 Sumn., 475;

Allore vs. Jewell, 94 U. S., 506.

Meader vs. Norton, 11 Wall., 422.

See also McIntire vs. Pryor, 173 U. S., 38, which was a case where the Court held that a gross fraud had been committed dispossessing defendants of their property. The Court held that in view of the peculiar circumstances of the case a fraud so glaring, the original and persistent intention of McIntire through so many years, to make himself the owner of the property, *the utter disregard shown of the rights of the plaintiff as well as of the mortgagee, and the fact that a decree could do no harm to any innocent person*—those facts do away with the defense of *laches* and demand of the Court prompt and immediate relief for the complainant.

The Buffalo Hump Company sold the property, which we charge was obtained from us by fraud, to the other defendant, the Empire State-Idaho Mining & Developing Company, on January 17th, 1901. The answer, in the latter end of paragraph 10 (see page 48, Vol. I, Trans.), admits:

"Defendants admit that the consideration paid by the Em-
"pire State-Idaho Mining & Developing Company to the Buffalo
"Hump Mining Company for the conveyance of the Ella and
"Missing Link lode claims was fully represented by transfer
"of shares of stock of the Empire State-Idaho Mining & De-
"veloping Company to the Buffalo Hump Company."

So that no innocent parties can claim to be injured.

It is shown by the testimony of Mr. Sweeny (see pages 474-5, Vol. II, Trans.) and is admitted by the answer (see pages 30, 37, Vol. I, Trans.) that Mr. Sweeny was the general manager of the Buffalo Hump Company and of the Empire State Company at the time, and at all times since the transfer of the Ella and Missing Link to the Buffalo Hump Company; that Edwin Packard was the president of both companies at all such times; that Mr. Culbertson was the assistant manager of both companies at practically all of such time; and that the board of trustees was practically the same all the time. Therefore no change of ownership has taken place in these properties, at least not since we have discovered the fraud. The new crowd that gave up stock in their company to the old company, in which they, too, were stockholders, had notice of the fraud. Their general manager, Mr. Sweeny, perpetrated the fraud upon us. Their president, Mr. Packard, was the president of the Buffalo Hump Company.

In the case of the Distilled Spirits, 11 Wall., 356, this rule is announced by the Court (we quote from the syllabus):

"The rule that notice to the agent is notice to the principal

"applies not only to knowledge acquired by the agent in the "particular transaction, but to knowledge acquired by him in "all prior transactions and present to his mind at the time he "is acting as such agent, provided it be of such a character as "he may communicate to his principal without breach of pro- "fessional confidence."

In McIntire vs. Pryor, 173 U. S., the Court approves the case of Distilled Spirits and amplifies it in these words:

"Much more is this the case where the fraud is committed "by the agent himself in obtaining title to the property for the "benefit of his principal."

Thompson, Corporations, Vol. IV, Secs. 5200, 5222, 5228.

Smith vs. South Royalton Bank, 76 Am. Dec., 179.

A particularly strong case on this point is Cox et al. vs. Pierce et al., 112 N. Y., 641.

In the case of Neblett vs. McFarland, 92 U. S., at page 105, Mr. Justice Hunt announces these principles:

"In Gatley vs. Newell, 9 Ind., 572, it is said: 'The party " 'defendant is not bound to rescind until the lapse of a rea- " 'sonable time after discovering the fraud. Hence the parties " 'cannot be placed *in statu quo* as to time.'

"Parties engaged in a fraudulent attempt to obtain a neigh- "bor's property are not the object of the special solicitude of "the courts. If they are caught in their own toils, and are "themselves the sufferers, it is a legitimate consequence of "their violation of the rules of law and morality. Those who "violate these laws must suffer the penalty."

VI. The real condition of the Cross-cut and Drill Hole No. 2 and what was found in them.

Upon the question of the size and value of the ore body found in the cross-cut, defendants attempted to make a great point by making a challenge to us, *after the evidence was all in on both sides,* to have the Court send an umpire and advise the Court as to whether there was not a slab of barren rock standing upon the floor of that cross-cut at the point where the cross-cut is supposed to have cut the ore body, and that being the case defendants claim that this should be proof conclusive that no ore of any consequence was found in the cross-cut. We opposed that course being taken upon the ground that if our testimony upon the subject was false the defendants had it in their power to prove conclusively what ore was found in the cross-cut and that the condition of the floor of that cross-cut at that time was not conclusive at all of the size of the ore body penetrated by the cross-cut. Defendants did not call either Mr. Sweeny, general manager, or Mr. Culbertson, his assistant, or Mr. Miller, their chief engineer, nor did they show or produce the progress map showing the progress and the character of the work month by month, but they called one witness, a man by the name of Stone, and there they stopped. We contend that the voids extending indefinitely above the floor of the cross-cut and indefinitely downward (with the exception of a small slab found in the floor) speak more powerfully and more eloquently as to what was found in that cross-cut than the testimony of all the witnesses that could be called on either side.

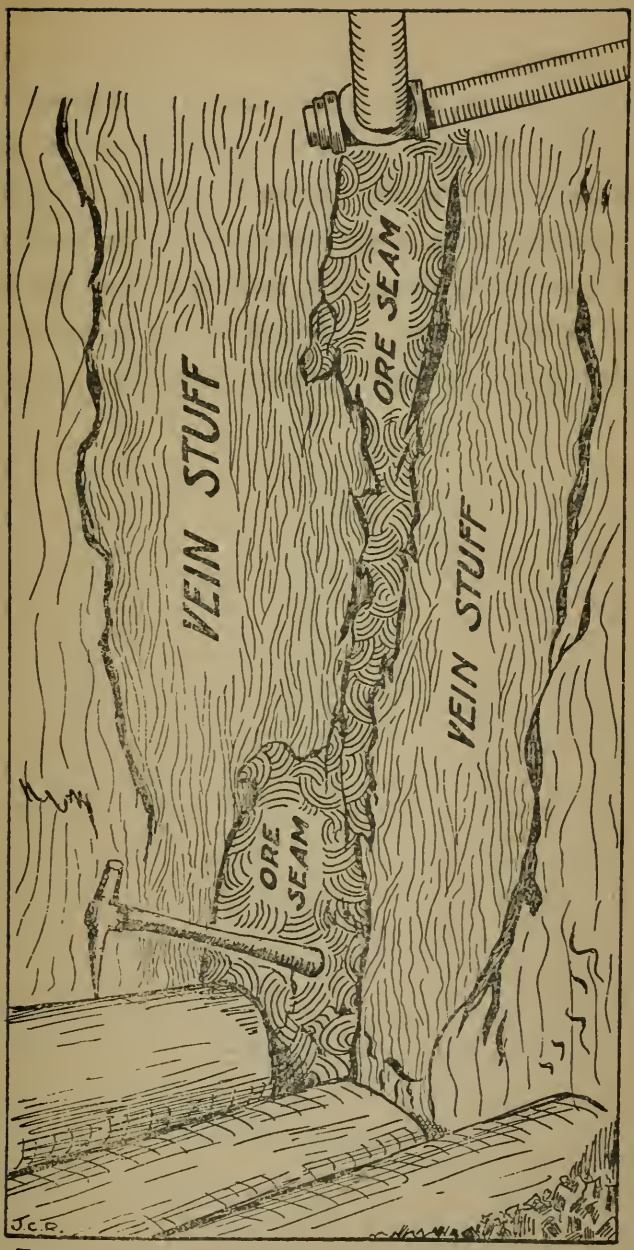

FIG. 2 : PANTOGRAPHIC REPRODUCTION OF PLAINTIFF'S EXHIBIT Nº SHOWING WEST FACE OF EAST DRIFT.

The annexed figure 2, a pantographic reproduction of plaintiff's exhibit No. 53, showing west face of the east drift, illustrates a freak of nature that occurs not unusually in mining. Here is an ore seam which, judging from the pick handle extending partially across it and judging from other surrounding objects taken by the photograph, must be at least two feet in width at its base. Three feet above that point it narrows down abruptly to a very few inches. The annexed figure 3 represents

FIG 3: FIG 2 INVERTED - ILLUSTRATING HOW ORE SEAM CAN PINCH AT FLOOR OF A DRIFT.

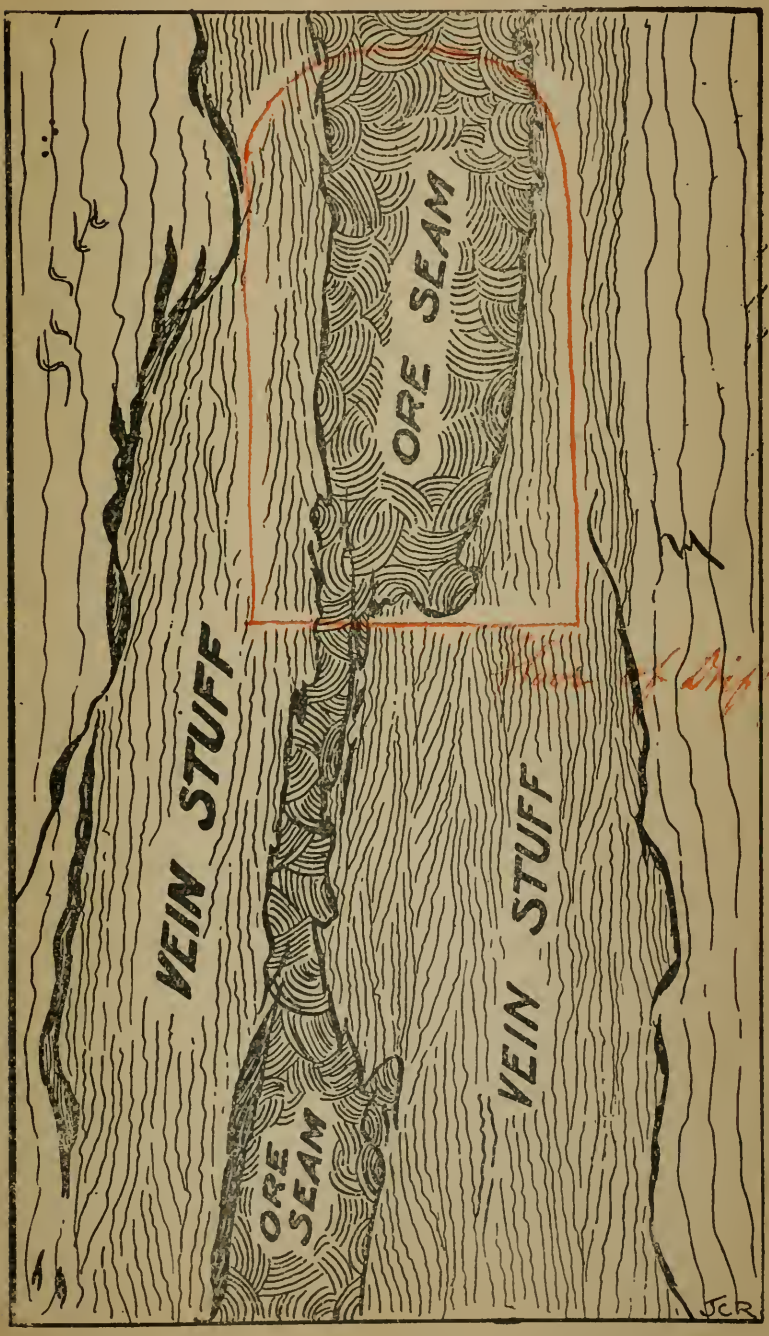

figure 2 inverted, and illustrates how an ore seam can pinch at the floor of the drift. Figure 3 shows a condition that might have existed at the place where the ore was encountered on this cross-cut. Mr. Ralston testified that he took the photograph, of which this is a reproduction, in the vicinity where it is claimed by the defendants this barren slab of rock was found in the floor of the cross-cut. Being a reproduction, we do not claim these figures to be official; they are used by us only to illustrate our argument. Mr. Culbertson's testimony strengthens our theory with reference to this matter very materially. At p. 218, Vol. I, Trans., he says:

"In other places we find where a diamond drill hole might "penetrate a body of ore, and within ten feet of that point, there "would be no ore."

As against this barren slab of rock in the floor of the cross-cut, upon which defendants put so much reliance and which we think we have demonstrated to the Court, simply results from the ore seam pinching at that point, we have the testimony upon our side as to the size of the ore body found there at the time the cross-cut was driven of Mr. Thomas Jay, foreman of defendants at the time the work was done (see page 426, Vol. I, Trans.), of Mr. Amos Jay, shift boss (see pp. 566-9, Vol. II, Trans.), of Mr. Ralston, who testified that he found pieces of clean ore on the four corners at the point the cross-cut intersected the vein, and who measured the voids above and below the cross-cut (see pp. 613, 623, 630, Vol. II, Trans.), of Mr.

Porter, an engineer, who measured the size of the voids at the point the ore was struck in the cross-cut where it had been stoped out above the cross-cut on the drift extending in both directions from the cross-cut and from within a few feet of the floor of the cross-cut, extending downward several levels (see pp. 587-602, Vol. II, Trans.), also of Mr. Cartwright, defendant's witness and foreman; all to the effect that the voids both in the stopes and the drifts were from 6 to more than 12 feet in width.

It is not strange, however, that defendants should take this position with reference to the size of the ore body in the cross-cut. They took a similar position with reference to the size of the ore body struck in drill hole No. 2 immediately within the Ella and Missing Link east lines. They denied the size of the ore body. Mr. Culbertson insisted that he did not consider it much of a strike. (See page 272, Vol. I, Trans.) He does not say how big it was, nor what was found there, but he gives simply his opinion. He does say, however, that Mr. Sweeny was pretty enthusiastic over it, though Mr. Sweeny, when on the stand, testified that he did not consider it of any consequence. However, when the foreman of the diamond drill crew was called (Mr. N. H. Wright)—*and he was called by the defendants*—we found our witnesses had been pretty conservative in their statements of the size of the ore body. Mr. Wright testified (see page 797, Vol. II, Trans.):

"Q. Where is what you found?

"A. Well, here is 'ore, ore mixed, 79-94.'

"Q. What do you mean by that?

"A. 79 to 94 feet.

"Q. 79 to 94 feet would be 15 feet?

"A. Yes.

Q. 15 feet of ore, you met on the 15th?

"A. Ore mixed is what it is."

And at page 798 the same witness testified from a record that was made at the time the ore was struck, saying:

"Q. Now turn to the 13th day of August and will you give "the reporter the record there; read it just as you have it?

"A. It is 'Knight, day shift, sixteen feet.' That leaves the "hole at 94 feet, and from 79 to 94 'ore mixed.' "

And again at page 798, Vol. II, Trans.:

"Q. What was the result of that in this core; how much ore "of whatever grades was there, just tell us?

"A. Well, of course, this record I have here was made "right after the shift, after it was reported, but after examining "the core and examining the cuttings, we determined *there was "about six feet of good concentrating ore,* and the rest in the "latter part was ore with seams in it."

And again at page 799, Vol. II, Trans.:

"Q. When you speak of that as concentrating ore, about how "good was that ore?

"A. Well, really, *I don't know whether I can answer that "question. That would be determined better by assaying a "sample that came up; I considered it a pretty good strike, "though, that is the way I felt about it at the time, but as to the "quality it was hard for me to determine."*

Mr. MacDonald testified that they cut about 6 feet of solid galena, as the core showed. (See page 287, Vol. I, Trans.) Mr. Thomas Jay, foreman of the Buffalo Hump Company, at the time the drift was run which encountered the ore at the point drill hole No. 2 penetrated it, testified that it was four feet of solid shipping ore at that point, and that there was concentrating ore on both sides of the drift, that it was wider there than at any other place. He also testified that the solid streak (the clean ore), while only four feet in width at right angles, *was about six feet measured at the angle at which the drill struck, thus* corroborating Mr. MacDonald as to the size of the solid ore found in the drill hole. (See pp. 439-40, Vol. II, Trans.)

Mr. Amos Jay, the shift boss of the Buffalo Hump Company, fully corroborates Mr. Thomas Jay (see pp. 567-72, Vol. II, Trans.) It will be observed that Mr. Thomas Jay wrote down in a little book, that is in evidence in this case, the size of the drift where the drill hole penetrated the ore, also the date when the drill hole was encountered by the drift. Mr. Porter examined the voids at the point where the drill hole penetrated the ore, and he testified that the drift was between 10 and 15 feet wide at that point, and that the stopes above and below were of the same size. (See pp. 594-5, Vol. II, Trans.) Mr. Ralston fully corroborates Mr. Porter. (See page 623, Vol. II, Trans.) These same witnesses also testified that at the time of their first examination all the ore had not been mined out immediately below the drill hole, that they took samples within

three feet of where the drill hole penetrated and that it ran very high. (P. 593, Vol. II, Trans.) They testified that afterwards upon a second examination the ore was all mined out underneath the drill hole practically down to the 1300. The defendants brought no witnesses to contradict or to deny the testimony of complainants' witnesses upon this point except the opinions expressed, *supra,* by Mr. Sweeny and Mr. Culbertson to the effect that the strike did not amount to much. Here, then, is this splendid showing all within our ground made by the defendants unlawfully, by trespasses committed at those points in the mine, where we could not discover it, had we attempted to do so, all suppressed from us at the time of the purchase, and the Court below held this to be a fair transaction untainted by fraud.

VII. Complainants contend that they are entitled to a decree upon the admitted facts.

We earnestly urge that, upon the admitted facts, we are entitled to a decree cancelling the sale. We insist as a matter of law that the defendants, having obtained their knowledge of our property fraudulently and unlawfully without our knowledge and without our consent, and having purchased from us under those conditions, it was their duty to make full disclosures of the facts. It was their duty to advise us of the size of the ore body struck by the drill within our ground and without our permission on the east end of the Ella, because the knowledge which they had of the transaction was not equally accessible

to us and was obtained by them unlawfully. It was their duty also to make full disclosures to us at the time or prior to the purchase of the size and quality of the ore body struck within our ground upon the west end of the Ella by the cross-cut, because the knowledge they had of the matter was not equally accessible to us, and because it was obtained by them unlawfully. The rule of law which allows them to prospect their own ground at depth within a few inches of our line when doing so in the regular course of mining, and determine the size of an ore body at that point, and then prospect their ground at the other end of our ground and determine the size of the ore body at that point, and then form an opinion as to the size and continuity of the ore body passing between those two points through our ground, before they purchase from us, is the very furthest limit to which the rule may be carried and approaches very near to the danger line, if it does not cross it. Even such conduct would shock the conscience of an honest man as being contrary to fair dealing. Will anyone claim that it is not wrong, unjust and dishonest for one to prospect his neighbor's ground at depth under cover of a big mountain, simply because he found our workings there the only means of access to the point at which the trespass was committed being within the private and undisputed property of the trespasser? And having satisfied himself of the value, not by one trespass, but by still another, the latter having no connection and being in no wise dependent upon our works, having made assurance doubly sure, armed with this knowledge unlawfully obtained, knowing that his

victim has no knowledge on the subject, with no means of acquiring it, and knowing that his victim is laboring under the misapprehension that he knows as much—yes, more—than the intending purchaser about the value of the property, and under these conditions makes the purchase? Yet this is exactly what the record in this case shows the defendants have done; it is what they admit having done; it is exactly what the Circuit Judge found they did.

What is the difference between the facts as we have now detailed them and as they are admitted to exist in this record and the following case: Suppose Mr. Patrick Clark and Mr. B. C. Kingsbury, being partners, owned the "Keep Cool" mine; that Mr. Kingsbury was in New York and Mr. Clark was in Spokane; that a big strike should be made on the mine and Mr. Clark should wire to Mr. Kingsbury at New York as follows: "Big strike on Keep Cool; mine worth a million dollars; don't sell stock." Suppose that the telegraph operator that took this message from the wire should step across the street with the telegram to the office of Mr. Sweeny and show it to him, and that Mr. Sweeny armed with this knowledge should immediately rush to the Fifth Avenue Hotel, ask Mr. Kingsbury if he wanted to sell his stock in the Keep Cool, make no false representations—in fact, no statements of any kind whatsoever—and that Mr. Kingsbury should say: "Yes, I will sell it for $4000," and that Mr. Sweeny should simply give him a check taking the stock and closing the deal, and then suppose that half an hour later the telegram from Mr. Clark should be delivered to Mr.

Kingsbury, will anyone say that Mr. Kingsbury had not a cause of action against Mr. Sweeny to recover back that stock? Where is the difference in principle between the two cases?

Again, suppose that Mr. Clark owns the Bonanza mine, a mere prospect; that Mr. Sweeny without his knowledge should send a gang of men down to the bottom of the shaft, that had no ore in it at all, that in fact had been abandoned by Mr. Clark, and that he should run a diamond drill through the vein, strike a splendid body of ore at a distance of 50 feet away from the bottom of the shaft. Armed with that knowledge thus unlawfully obtained, suppose he should approach Mr. Clark, make no misrepresentations at all, but simply ask him if he cared to sell the Bonanza, and if so to put a price upon it. Mr. Clark put a price of $4,000.00 on it, Mr. Sweeny gave him a check and the deed passed. Will any one say that Mr. Clark had no cause of action upon those facts to recover back his property? Where in principle is there any distinction between this case and the admitted facts of the case presented to the Court?

VIII. Complainants should have been awarded their expenses going to New York to take the testimony of Mr. Sweeny.

Complainants should have had the expenses of going to New York to take the testimony of Mr. Charles Sweeny allowed them. The affidavits of Mr. Stoll, Mr. Gordon and

Mr. MacDonald at pp. 135-9, Vol. I, Trans., show the necessity for Mr. Patrick Clark, Mr. Stoll and Mr. Gordon going to New York. They also show the expenses incurred in going. There is no evidence in the record in opposition to this. It should therefore be taken as conclusive. Notice was given the other side that the matter would be called for decision by the Court at Boise on March 31st. (See p. 137, Vol. I, Trans.) It was brought to the attention of the Court and submitted, as will appear by the Court's opinion. (See p. 166, Vol. I, Trans.) The Court neglected to decide it, holding that he could not do so from the proofs offered, and that it was not properly presented. As we were unable to offer any further proofs, nor put it in any other shape, and as the proofs offered by us were clear and conclusive, we will stand upon the proofs made and take the decision of this Court as to the correctness of the ruling of the Circuit Judge. The Circuit Judge made an order *on defendants' motion* allowing us our expenses in going to New York upon this occasion, but did not determine the amount. (See pp. 127-8, Vol. I., Trans.) That order was not excepted to by the other side, and therefore it is final.

IX. Some Additional Authorities.

As to Mr. Sweeny's power to bind the defendants for the fraud charged in this case, he being their General Manager, see:

IV Thompson, Corporations, Sec. 5303, and authorities cited.

To the point that while it is the rule that a vendee who has information of a mine on the land of another of which the latter is ignorant, is under no legal obligation to disclose, *yet a very little is sufficient to affect the application of this principle, and statements ordinarily regarded as expressions of opinion will be considered statements of fact,* see:

Stackpole vs. Hancock, 45 L. R. A., 814.

Livingstone vs. Peru Iron Co., 2 Paige, 390.

Morgan vs. Dinges (Neb.), 36 N. W., 544.

Kelly vs. Sheldon, 8 Wis., 107.

Swim vs. Bush, 23 Mich., 99.

Prescott vs. Wright, 4 Gray, 461.

Fairbault vs. Sater, 13 Minn., 210.

Hedin vs. Minn. Medical & Surgical Inst., 35 L. R. A., 430.

Wright vs. Wright, 37 Mich., 55.

Dunn vs. White, 63 Mo., 181.

Newburyport Ins. Co. vs. Oliver, 8 Mass., 409.

To the point that a tender is not necessary to be either made or kept good in a suit such as this to set aside a contract for fraud where the bill shows or the proof is, that defendant is

indebted to the complainants in a greater sum than that paid by the defendant, and the bill asks an investigation and statement of accounts existing between the parties, see:

Watts vs. White, 13 Cal., 321.

Higby vs. Whittaker, 8 Ohio, 198.

Hills vs. Nat'l Albany Exchange Bank, 12 Fed., 95.

Billings vs. Aspen M. & M. Co., 2 C. C. A., 263.

The appellants respectfully insist that they are entitled to have the decree of the Circuit Court reversed and a decree entered in their favor.

Respectfully Submitted,

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W. W. WOODS,
M. J. GORDON,
Solicitors for Appellants.